Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1410

JOEL EDELMAN, DIRECTOR OF ILLINOIS DEPARTMENT OF PUBLIC AID, AND SUCCESSOR TO EDWARD WEAVER, FORMER DIRECTOR OF PUBLIC AID,

Petitioner,

vs.

JOHN JORDAN, et al.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street,
Chicago, Illinois,

DONALD S. CARNOW,
Special Assistant Attorney General,
300 West Washington Street,
Chicago, Illinois,

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PETITION FOR CERTIORARI FILED APRIL 16, 1973
CERTIORARI GRANTED JUNE 11, 1973

INDEX

1. Chronological List of relevant Docket Entries. 1

2. Plaintiff's complaint for Declaratory Judgment, Equitable and Other Appropriate Relief, Filed January 12, 1971 4

3. Motion for Temporary Restraining Order and Affidavit of Jeanette Bryant, Filed January 14, 1971 17

4. Order In Rodriquez v. Swank, attached as Exhibit B to Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order, Filed January 14, 1971 22

5. Analysis of Registered Applications Pending Investigation, Cook County Department of Public Aid, November 1970, attached as Exhibit D to Memoradnum in Support of Plaintiffs' Motion for Temporary Restraining Order, Filed January 14, 1971 30

6. Temporary Restraining Order, Filed January 21, 1971..... 31

7. Amended Complaint for Declaratory Judgment, Equitable and other Appropriate Relief, Filed January 28, 1971 37

8. Answer of Defendants Daniel and Barrett to Plaintiffs' Amended Complaint, Filed February 16, 1971 49

9. Analysis of Registered Applications Pending Investigation Cook County Department of Public Aid, December, 1970 and January, 1971, Filed March 17, 1971 56

10. Answer of Defendant Swank to Plaintiffs' Amended Complaint, Filed March 22, 1971 58

11. Request to Defendant Swank for Production of Documents, Filed March 29, 1971 63

12. Motion to Strike Certain Portions of Defendants' Answers, Filed April 5, 1971 67

13. Motion for Preliminary Injunction, Filed April 5, 1971..... 72

14. Minute Order Granting Motion to Strike Certain Portions of Defendants' Answer, Filed April 15, 1971 73

15. Preliminary Injunction, Order and Decree - April 16, 1971 .. 74

16. Motion for Order for Production of Documents, Filed June 23, 1971 80

17. Minute Order granting Motion for Order to Produce - June 23, 1971 84

18. Motion for Order that Facts be Taken as Established, Filed July 27, 1971 and Exhibit A, Handbook Transmittal No. 139, February 8, 1963, Department of Health, Education and Welfare 85

19. Minute Order Granting Motion that Facts be Taken as Established - July 27, 1971 89

20. Monthly Illinois Department of Public Aid Report of Disposed Applications at End of Month by Date of Application, May, 1971, Filed September 1, 1971..... 90

21. Cook County Department of Public Aid Inter-Office Memoradnum, Filed October 21, 1971 part of case record of Plaintiff Jordan attached as Exhibit to Plaintiffs' Motion for Summary Judgement, Permanent Injunction and Other Relief. 10

22. Defendants' Brief in Opposition to Motion of Plaintiffs for Summary Judgment, Permanent Injunction and Other Relief, Filed December 1, 1971 106

23. Adoption of Swank's Brief by Daniel and Cook County Department of Public Aid, Filed December 6, 1971..... 115

24. Memorandum Opinion and Order Granting Summary Judgment, Filed February 4, 1972 117

25. Judgment Order and Decree, Filed March 15, 1972 122

26. Illinois Department of Public Aid MAG Applications disposed by program; number and recent disposed by program, March, 1973 129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1410

JOEL EDELMAN, DIRECTOR OF ILLINOIS DEPARTMENT OF PUBLIC AID, AND SUCCESSOR TO EDWARD WEAVER, FORMER DIRECTOR OF PUBLIC AID,

Petitioner,

VS.

JOHN JORDAN, et al.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX

CHRONOLOGICAL LIST
OF RELEVANT DOCKET ENTRIES

January 12, 1971	Plaintiff's Complaint for Declaratory Judgment, Equitable and Other Appropriate Relief,
January 14, 1971	Motion for Temporary Restraining Order and Affidavit of Jeanette Bryant, Filed,
January 14, 1971	Order in Rodriguez v. Swank, attached as Exhibit B to Memorandum in Support of Plaintiffs' Motion for Temporary Restraining order, filed,
January 14, 1971	Analysis of Registered Applications Pending Investigation, Cook County Department of Public Aid, November 1970, attached as Exhibit D to Memorandum in Support of Plaintiffs' Motion for Temporary Restraining Order,
January 21, 1971	Temporary Restraining Order, Filed
January 28, 1971	Amended Complaint for Declaratory Judgment, Equitable and Other Appropriate Relief,
February 16, 1971	Answer to Defendants Daniel and Barrett to Plaintiffs' Amended Complaint, Filed
March 17, 1971	Analysis of Registered Applications Pending Investigation, Cook County Department of Public Aid, December, 1970 and January, 1971,
March 22, 1971	Answer of Defendant Swank to Plaintiffs' Amended Complaint,
March 29, 1971	Request to Defendant Swank for Production of Documents,
April 5, 1971	Motion to Strike Certain Portions of Defendants' Answers,

April 15, 1971	Motion for Preliminary Injunction, Filed,
April 15, 1971	Minute Order Granting Motion to Strike Certain Portions of Defendants' Answer
April 16, 1971	Preliminary Injunction, order and decree.
June 23, 1971	Motion for Order for Porduction of Documents,
June 23, 1971	Minute Order granting Motion for Order to Produce
July 27, 1971	Motion for Order that Facts be Taken as Established, Filed July 27, 1971 and Exhibit A, Handbook Transmittal No. 139, February 8, 1963, Department of Health, Education and Welfare
July 27, 1971	Minute Order Granting Motion that Facts be Taken as Established -
September 1, 1971	Monthly Illinois Department of Publid Aid Report of Disposed Applications at End of Month by Date of Application, May, 1971,
October 21, 1971	Cook County Department of Public Aid Inter-Office Memorandum, filed October 21, 1971, part of case record of Plaintiff Jordan attached as Exhibit to Plaintiffs' Motion for Summary Judgment, Permanent Injunction and other relief.
December 1, 1971	Defendants' Brief in Opposition to Motion of Plaintiffs for Summary Judgment, Permanent Injunction and other relief,
December 6, 1971	Adoption of Swank's Brief by Daniel and Cook County Department of Public Aid, filed December 6,
February 4, 1972	Memorandum Opinion and Order Granting Summary Judgment, Filed February 4, 1972

March 1, 1973	Illinois Department of Public Aid MAG Application disposed by program, number and percent disposed by program,

ADDITION TO RELEVANT DOCKET ENTRIES

March 24, 1972	Defendants' Notice of Appeal
April 7, 1972	Plaintiff's Notice of Cross Appeal
January 18, 1973	Opinion and Order
May 22, 1973	Application for Stay Pending Petition for Certiorari
May 29, 1973	Objections by Plaintiff to Application for Stay Pending Appeal
May 31, 1973	Stay Pending Application for Certiorari denied by the Seventh Circuit Court of Appeals. Stay Pending Appeal granted by Supreme Court with respect to Paragraphs 5 and 6 of Final Judgment and Decree

DOCKETED

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

71 JAN 12 AM 11 00

CLERK
U.S. DISTRICT COURT

JOHN JORDAN, by his next friend, JEANETTE BRYANT, individually and on behalf of all other persons similarly situated,

Plaintiffs,

vs.

HAROLD O. SWANK, Director, Illinois Department of Public Aid; DAVID DANIEL, Director, Cook County Department of Public Aid; EDWARD J. BARRETT, Comptroller of Cook County, individually and in their official capacities,

Defendants,

71 C 70

COMPLAINT FOR DECLARATORY JUDGMENT EQUITABLE, AND OTHER APPROPRIATE RELIEF

PRELIMINARY STATEMENT

1. Plaintiff, individually and on behalf of all other persons similarly situated, seeks primarily to have this Court declare mandatory and binding on the defendants federal regulations requiring all applications for Aid to the Aged, Blind and Disabled (AABD) to be acted upon within thirty days from the date of application, and requiring actual receipt of payment within thirty days for those determined eligible, and further declaring void all state statutes and regulations inconsistent with said mandatory federal regulations. Plaintiff also seeks

a declaration that the Illinois Public Aid Code, ch. 23, Section 3-1, Ill.Rev.Stat., federal law, 45 C.F.R. § 233.20(a)(1)(2)(iii), and equal protection of the laws as guaranteed by the fourteenth amendment to the United States Constitution, require AABD to be paid from the date of application if the applicant meets the eligibility conditions at the time of application.

JURISDICTION

2. Jurisdiction is conferred on this court by 28 U.S.C. § 1343(3)(4) and by 28 U.S.C. § 1331. The amount in controversy, exclusive of interest and costs, exceeds the sum or value of $10,000.00.

3. Plaintiff's action for declaratory and injunctive relief, and for benefits wrongfully withheld is authorized by:

(a) 28 U.S.C. §§ 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure, which relate to declaratory judgments;

(b) 42 U.S.C. § 1983 which provides redress for the deprivation under color of law of rights, privileges, and immunities secured by the Constitution and laws of the United States.

PLAINTIFFS

4. The named plaintiff, John Jordan, age sixty-one, lives at 4241 W. Calumet, Chicago, Illinois, in a room of the apartment of Jeanette Bryant.

5. John Jordan has a substantial mental deficiency

and functions at the level of a small child. Jeanette Bryant generally supervises most matters affecting the everyday life of John Jordan.

CLASS ACTION

6. The named plaintiff brings this action on his own behalf and pursuant to Rule 23(a) and (b) of the Federal Rules of Civil Procedure, on behalf of all other persons similarly situated.

DEFENDANTS

7. Defendants are as follows: (a) Harold O. Swank, is the Director of the Illinois Department of Public Aid and is charged with statewide administration of the public assistance programs, including Aid to the Aged, Blind and Disabled, and with establishing regulations to carry out the statutory provisions of such programs; (b) David Daniel is the Director of the Cook County Department of Public Aid, an agency of the Illinois Department of Public Aid, and is responsible for administering the public assistance programs in Cook County; and (c) Edward J. Barrett, is the Comptroller of Cook County, responsible for the signing of emergency welfare checks.

FACTUAL ALLEGATIONS

8. John Jordan has a substantial mental impairment and functions at the level of a small child. He is unable to

read or to recognize and count money. His intelligence is so limited that he requires supervision in most matters affecting his everyday life. His mental impairment is of a permanent nature and substantially impairs his ability to perform labor or services or to engage in any useful occupation.

9. On or about September 18, 1970 John Jordan applied for Aid to the Disabled at the Oakland office of the Cook County Department of Public Aid.

10. At the time of his application for Aid to the Disabled John Jordan met all of the eligibility conditions for Aid to the Disabled, and he still meets said eligibility conditions, and is in all ways qualified for such assistance.

11. John Jordan, or friends acting on his behalf, have cooperated with the Cook County Department of Public Aid in all respects and have furnished all information requested by the Cook County Department of Public Aid and its employees.

12. The Cook County Department of Public Aid has yet to act on John Jordan's application for Aid to the Disabled and John Jordan has not received any such assistance from the defendants as of the date of filing this law suit.

13. The sole reason for the delay is that the case-worker of the Cook County Department of Public Aid assigned to John Jordan's application has not had time to act on John Jordan's application.

14. John Jordan has no income or assets except for

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he approximately $2.00 he earns by working at a drugstore one ay a week and other infrequent odd jobs involving manual labor.

15. John Jordan is in dire need of monetary and edical assistance. He does not eat properly and is suffering rom malnourishment because of lack of sufficient funds and is resently sick with a cold and cough and in need of medical are. Also he lacks vision in one eye and needs to be fitted or glasses.

16. Because his application for Aid to the Disabled as not been acted upon and approved, John Jordan has suffered nd will continue to suffer irreparable injury, loss, and amage because of the lack of adequate funds to purchase those ecessities requisite for a minimum standard of life compatible ith health and well-being.

COUNT I

17. Count I is brought as a class action by the named laintiff on his own behalf and on behalf of all other persons imilarly situated pursuant to Rule 23(a) and (b) of the Federal ules of Civil Procedure. The class is composed of all persons n Illinois eligible for Aid to the Aged, Blind, or Disabled, hereinafter "AABD") who are required by defendants to wait onger than 30 days after application for a determination of [illegible]

claims of plaintiff are typical of the claims of the class. Plaintiffs will fairly and adequately protect the interests of the class.

18. Illinois participates in the Federal government's Program of Aid to the Aged, Blind, and Disabled (AABD), established by the Social Security Act, 42 U.S.C. Subchapter XVI, §§ 1381 et. seq. As a condition thereof, Illinois is required to conform with the requirements of the Social Security Act and regulations promulgated thereunder by the United States Department of Health, Education and Welfare.

19. The Social Security Act provides that

> "all individuals wishing to make application under the (AABD) plan shall have opportunity to do so and that such aid or assistance shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 1382(a)(8).

20. At all times relevant herein, the regulations of the Department of Health, Education and Welfare have required that action on applications for AABD be taken within thirty days, including, for those determined eligible, the actual receipt of AABD assistance. Handbook of Public Assistance Administration, Part IV, Section 2200(b)(3)(4), 2300(b)(3)(5).

21. The defendants maintain that these abovementioned regulations are not mandatory and binding on them with respect to AABD applications.

22. As of the end of November, 1970, approximately 30% of the applications for AABD pending at the Cook County

Department of Public Aid had been pending longer than 30 days.

23. The rules and regulations of the defendant Illinois Department of Public Aid with respect to time standards for processing of AABD applications, Illinois Categorical Assistance Manual, Sections 4004-4004.3, are in violation of the requirements of the Social Security Act and regulations quoted above in paragraphs 19 and 20.

24. Further, at all times relevant herein, Section 8255 (and subsections thereunder), Illinois Department of Public Aid, Categorical Assistance Manual, has provided that initial grants (including AABD) may be authorized only for the month in which the application has been approved, but not for any prior months.

25. Pursuant to Section 8255, Illinois Categorical Assistance Manual, plaintiff John Jordan is barred from receiving AABD benefits for October, November, and December, 1970 in violation of the Social Security Act and regulations quoted above in paragraphs 19 and 20.

26. By failing to follow the "30 day requirement" of federal law, the defendants and their agents acting under color of state law, have unlawfully deprived plaintiffs of AABD assistance and their rights under the Social Security Act and the regulations issued pursuant thereto.

27. No adequate administrative remedy or remedy at law is available to the plaintiffs.

28. Plaintiffs have suffered irreparable damage to their health and well-being and will continue to suffer severe

and irreparable injury because of the failure of defendants and their agents to comply with the "30 day requirement."

COUNT II

29. Count II is brought as a class action by the named plaintiff on his own behalf and on behalf of all other persons similarly situated pursuant to Rule 23(a)(b) of the Federal Rules of Civil Procedure. The class is composed of all applicants for AABD in Illinois who meet the eligibility requirements when they apply but are denied benefits for the intervening period from the date of application to the month in which their grant is authorized. This class is so numerous that joinder of all members is impractical. There are questions of law and fact common to the class. The claims of plaintiff are typical of the claims of the class. Plaintiffs will fairly and adequately protect the interests of the class.

30. Some eligible applicants for AABD similarly situated to John Jordan applied for AABD benefits in September, 1970, and were determined eligible in said month and began receiving assistance in and for said month.

31. Some eligible applicants similarly situated to John Jordan applied for AABD benefits in September, 1970, and were determined eligible in October, some were determined eligible in November, and some were determined eligible in December, and as a consequence, said applicants began receiving assistance in and for October, November, and December respec-

tively, but not for any period prior to the month in which they were determined eligible.

32. By delaying determinations of eligibility, the defendants lessen expenditures to the needy for basic subsistence payments.

33. To condition the date upon which AABD benefits begin to the speed of the administrative process, is to establish wholly arbitrary and invidious classifications between similarly situated, equally needy persons.

34. Section 8255 of the Illinois Categorical Assistance Manual is invalid and unconstitutional on its face and as applied to plaintiffs in violation of the equal protection clause of the fourteenth amendment to the Constitution of the United States.

35. The policy of the defendant Illinois Department of Public Aid, and the practices of its 102 agent County Departments of Public Aid throughout the State of Illinois, do not require AABD assistance be paid from the date of application when the applicant meets all of the eligibility conditions at that time.

36. The policy and practices of the defendants described in paragraph 35 above and in this Count are in violation of the Social Security Act, 42 U.S.C. § 1381 et. seq. and federal regulations issued thereunder, 45 C.F.R. § 233.20 (a)(1)(2)(iii), and Department of Health, Education and Welfare,

Handbook of Public Assistance Administration, Part II, § 3300, § 4300.

37. The policy and practices of the defendants described in paragraph 35 above and in this Count are in violation of the Illinois Public Aid Code, ch. 23, Section 3-1, Ill.Rev.Stat. which provides that financial aid

> "shall be given under this Article to or in behalf of aged, blind, or disabled persons who meet the eligibility conditions..."

38. Plaintiffs have suffered and will continue to suffer irreparable injury to their health and well-being because of the policy and practice of the defendants described in paragraph 35 above and in this Count.

39. No adequate administrative remedy or adequate remedy at law is available to plaintiffs.

WHEREFORE, plaintiff respectfully prays, on behalf of himself and all others similarly situated, that this Honorable Court:

1. Enter a temporary restraining order enjoining the defendants, their successors in office, agents, and employees, and all other persons in active concert and participation with them, from continuing to cause irreparable harm to plaintiff and other persons similarly situated by failing to comply with the requirement for making determinations of eligibility for AABD applicants within 30 days and sending checks to those determined eligible within that same 30 day period.

2. Enter preliminary and permanent injunctions enjoining defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them, from failing to comply with the federal "30 day requirement" with respect to applicants for AABD.

3. Enter a final judgment declaring Illinois Categorical Assistance Manual Sections 4004 and 8255 (and subsections thereunder) as applied to applicants for AABD invalid insofar as they are inconsistent with the Social Security Act and regulations issued pursuant thereto.

4. Enter a final judgment declaring that the Illinois Public Aid Code, ch. 23, Sections 3-1, Ill.Rev.Stat., the Social Security Act and regulations thereunder, and equal protection of the laws as guaranteed by the fourteenth amendment to the United States Constitution require that applicants for AABD who meet the eligibility conditions for AABD at the time of their application are entitled to AABD benefits from the date of application.

5. Enter a permanent injunction enjoining the defendants to award to the entire class of plaintiffs all AABD benefits wrongfully withheld.

6. Allow punitive damages in the amount of $100,000.00 against Harold O. Swank.

//

7. Allow plaintiff his costs herein, and also grant him and all persons similarly situated, such additional or alternative relief as may seem to this Court to be just, proper and equitable.

Respectfully submitted,

Sheldon Roodman

Kenneth K. Howell

Sheldon Roodman
Kenneth K. Howell
Community Legal Counsel
116 South Michigan Avenue
Chicago, Illinois 60603
726-0157

Attorneys for Plaintiffs

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FILED
JAN 14 1971
H. STUART CUNNINGHAM
At _____ o'clock
CLERK

IN JORDAN, by his next friend
ARETTE BRYANT, individually
d on behalf of all other
rsons similarly situated,

Plaintiffs,

vs.

NO. 71 C 70

ROLD O. SWANK, Director,
linois Department of Public
d; DAVID DANIEL, Director,
ok County Department of
blic Aid; EDWARD J. BARRETT,
mptroller of Cook County,
dividually and in their
fficial capacities,

Defendants.

MOTION FOR A TEMPORARY RESTRAINING ORDER

Plaintiff, JOHN JORDAN, on his own behalf and on behalf of all other persons similarly situated, by his attorneys, SHELDON ROODMAN and KENNETH HOWELL, respectfully moves for the entry of a temporary restraining order enjoining the defendants, their successors in office, agents and employees, and all persons in active concert and participation with them, from failing to make determinations of eligibility or ineligibility for applicants for Aid to the Aged, Blind, or Disabled (hereinafter "AABD") within thirty days from the date of application, and from failing to provide the first AABD check within thirty days from the date of

application for those determined eligible for AABD, such check covering the full amount of the AABD entitlement had the application been acted upon within 30 days as required by federal law.

Further, the named plaintiff, John Jordan, respectfully moves for the entry of a temporary restraining order enjoining the defendant Cook County Department of Public Aid and its employees from failing to make a determination of eligibility on his application for AABD any later than 4:30 P.M., Friday, January 15, 1971, and in the event his application is approved, enjoining the defendants to issue no later than 4:30 P.M., Friday, January 15, 1971 a check for the full amount of his AABD entitlement had his application been acted upon within the maximum thirty day time period.

In support of this motion, plaintiff submits the affidavit of Jeanette Bryant, attached hereto, and a supporting memorandum of law with exhibits attached thereto.

Respectfully submitted

Sheldon Roodman
one of the Attorneys for the Plaintiffs

Sheldon Roodman
Kenneth K. Howell
Community Legal Counsel
116 South Michigan Avenue
Chicago, Illinois 60603

726-0157

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN JORDAN, by his next friend, JEANETTE BRYANT, individually and on behalf of all other persons similarly situated,

Plaintiffs.

vs.

No. 71 C 70

HAROLD O. SWANK, Director, Illinois Department of Public Aid; DAVID DANIEL, Director, Cook County Department of Public Aid; EDWARD J. BARRETT, Comptroller of Cook County, individually and in their official capacities,

Defendants.

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

AFFIDAVIT OF JEANETTE BRYANT

I, JEANETTE BRYANT, being first duly sworn, deposes and says:

1. My name is Jeanette Bryant and I live at 4241 South Calumet, Chicago, Illinois

2. John Jordan, age sixty one, is a roomer in my apartment at 4241 S. Calumet, Chicago, Illinois, and has been for over three years.

3. John Jordan has a substantial mental deficiency and functions at the level of a small child. He is unable to read or to recognize or count money. His intelligence is so limited that he requires supervision in most matters affecting his every day life. I have cared for John Jordan with the

assistance of the Progressive Baptist Church and some members thereof.

4. On or about September 18, 1970, John Jordan applied for disability assistance at the Oakland Office of the Cook County Department of Public Aid.

5. A caseworker from the Cook County Department of Public Aid, Anna Marie McCarthy, came to my apartment in November for a home visit in connection with John Jordan's application for disability assistance.

6. I and John Jordan have cooperated in every way possible with any and all requests of the Cook County Department of Public Aid and its employees.

7. John Jordan has no income or assets except for approximately $2.00 he earns by working at a drugstore one day a week and other occasional odd jobs.

8. The Cook County Department of Public Aid has yet to act on the application for disability assistance of John Jordan and John Jordan has not received any such assistance from the Department of Public Aid to date. Anna Marie McCarthy, the caseworker for John Jordan, has informed me that she is extremely busy and has not had time to act on John Jordan's application.

9. John Jordan is in dire need of monetary assistance and medical assistance. He does not eat properly because of lack of sufficient funds and is presently sick with a cold and cough and in need of medical care. Also he lacks vision in one eye and needs to be fitted for glasses.

Jeanette E. Bryant
Jeanette Bryant

Subscribed and Sworn to Before
me this 11th day of January, 1971

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ADYS RODRIGUEZ, individually, and on behalf of her minor children, RAFAEL, FRANCISCO, ILLIAM, and MIGUEL RODRIGUEZ; and on behalf of all other persons similarly situated,	)
Plaintiffs,	)
S. LORENA SMITH, on behalf of her minor children, STEVEN KELLY, DEBRA KELLY, and RAYMOND KELLY, and on behalf of all other persons similarly situated,	)
Plaintiff-Intervenor,	)
vs.	) No. 69 C 2615
HAROLD O. SWANK, Director, Illinois Department of Public Aid; DAVID DANIEL, Director, Cook County Department of Public Aid; EDWARD J. BARRETT, Cook County Comptroller,	)
Defendants.	)

ORDER

This matter coming on to be heard pursuant to this Court's Memorandum Opinion of September 23, 1970, and Orders entered on such date denying all of the defendants' motion to dismiss, denying defendant Harold O. Swank's motion for judgment on the pleadings, and allowing both counts of plaintiffs' complaint to be maintained as a class action, and pursuant to the stipulation of facts entered by the parties hereto; and

EXHIBIT "B"

The Court having conferred with counsel for the parties nd having determined that the several provisions of this Decree re necessary to prohibit the future violation of the binding ederal thirty-day requirements and to remedy past violations of aid thirty-day requirements, to the end that plaintiffs and the lass of persons represented by them shall have the full equitble relief to which they are entitled,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. From the date of the issuance of this Decree, (a) defendant David Daniel, as Director of the Cook County Department of Public Aid, is enjoined, ordered, and directed, and (b) defendant Harold O. Swank, as Director of the Illinois Department of Public Aid, is enjoined, ordered, and directed to cause and order the one hundred two (102) County Departments of Public Aid in the State of Illinois: to make all determinations of eligibility or ineligibility for all applicants for Aid to Families with Dependent Children (AFDC) within thirty (30) days from the date of application, such applications being made either orally or in writing, whichever is made first, subject only to the exception in paragraph 5, infra. Further, (a) defendants David Daniel, as Director of the Cook County Department of Public Aid, and Edward J. Barrett, as Comptroller of Cook County, are hereby enjoined, directed, and ordered, and (b) defendant Harold O. Swank, as Director of the Illinois Department of Public Aid is hereby enjoined, ordered, and directed to cause and order the one hundred two (102) County Departments of Public Aid in the State of Illi-

[illegible] and their respective

office), or otherwise: to cause for those applicants determined eligible the receipt by said applicants of their first full AFDC check within thirty (30) days from the date of application, subject only to the exception in paragraph 5, infra.

2. (a) defendant David Daniel, as Director of the Cook County Department of Public Aid, is hereby enjoined, ordered, and directed; and (b) defendant Harold O. Swank, as Director of the Illinois Department of Public Aid, is enjoined, ordered, and directed to cause and order the one hundred two (102) County Departments of Public Aid in the State of Illinois: to make determinations of eligibility or ineligibility of all pending AFDC applications within thirty (30) days from the date of issuance of this Decree, subject only to the exception in paragraph 5, infra. Further, (a) defendants David Daniel, as Director of Cook County Department of Public Aid, and Edward J. Barrett, as Comptroller of Cook County, are hereby enjoined, directed, and ordered, and (b) defendant Harold O. Swank, as Director of the Illinois Department of Public Aid, is hereby enjoined, ordered, and directed to cause and order the one hundred two (102) County Departments of Public Aid in the State of Illinois, and their respective comptrollers (or his counterpart in office) or otherwise: to cause for those applicants determined eligible

d receipt by said applicants of their first full AFDC check hin thirty (30) days from the date of the issuance of this cree, subject only to the exception in paragraph 5, infra.

3. That the defendant Harold O. Swank, Director, Illis Department of Public Aid, be and is hereby mandatorily enined, ordered, and directed to award, within one hundred and nty (120) days from the date of the issuance of this Decree, ll applicants for AFDC in the one hundred two (102) counties Illinois who were determined eligible on or after December 18, 69, where such determinations were not made within thirty (30) ys from the date of application, AFDC assistance from the thirth (30th) day after the date of application to the date the plicant's entitlement to AFDC became effective. Such award of troactive payments will be mailed to those persons currently ceiving AFDC within one hundred twenty (120) days from the mance of this Decree with an explanatory letter, said letter ving been first approved by plaintiffs' attorney. Any award ceived pursuant to this paragraph shall not be deemed income resources under Article IV, Section 4-1.6 of the Illinois blic Aid Code. For those persons not presently receiving DC:

(a) A certified letter (return receipt requested), d letter having been first approved by plaintiffs' attorney, ll be sent to the last known address of the party, informing in concise and easily understandable terms that he is owed ward of retroactive assistance, with the amount specified,

the Department of Public Aid, and that he may claim such ount by contacting the County Department of Public Aid at a cified address, within forty-five (45) days from the receipt said letter.

(b) If the County Department of Public Aid has not ceived such a request for the award of retroactive payments thin forty-five (45) days from the date of the returned re-ipt, the right to said award of retroactive payment shall be rfeited and the file shall be closed.

4. From the date of the issuance of this Decree, the en-tlement of all eligible AFDC applicants in the State of Illi-is shall attach no later then the thirtieth (30th) day after e date of application. In any case in which eligibility is termined subsequent to the thirtieth (30th) day after the te of application, the applicant shall be entitled to AFDC sistance retroactive to the thirtieth (30th) day, subject ly to the exception in paragraph 5, infra. If the applicant denied AFDC assistance retroactive to the thirtieth (30th) y, pursuant to paragraph 5, infra, said applicant must receive written statement explaining (a) that this denial was based on e failure or delay on the part of the applicant to provide spe-fied essential information, and (b) that the applicant has the ght to appeal within sixty (60) days this decision of the unty Department of Public Aid.

5. The sole exception to the thirty-day requirement as fined in paragraphs I and 4 is in those cases where it is im-ssible to make a determination of eligibility because of fail-

laintiffs' attorney a detailed statement as to the method for effectuating the relief required by paragraph 3, supra of this Decree. Any disputes between the parties as to whether the procedures and steps outlined by the defendant will fulfill the requirements of this Decree will be resolved by the Court.

10. Within forty-five (45) days from the date of this Decree, defendant Harold O. Swank shall submit to the Court and to the plaintiffs' attorney for the most recent full month a chart detailing the number of AFDC applications disposed of by length of time since date of application, for each county in the State of Illinois. This same information shall be provided to the Court and to the plaintiffs' attorney for each of the six months following the month in which this Decree is granted. Defendant David Daniel shall submit to the Court and to the plaintiffs' attorney for each of the six months following the month which this Decree is granted the chart, Analysis of Registered Applications Pending Investigation, Source: Cook County Department of Public Aid - Form CCDPA-264.

11. Defendant Harold O. Swank is directed to provide copies of this Decree to each County Department of Public Aid in the State of Illinois and to issue an Official Bulletin of the Illinois Department of Public Aid incorporating the provisions of this Decree within five (5) days from the entry thereof.

12. The relief required by paragraph 3 of this Decree shall be stayed pending any appeals in this cause. No later than one hundred twenty (120) days from the date the relief required by

r delay on the part of the applicant to provide essential
rmation; in such instances, the case record must show that
delay or failure results from circumstances within the appli-
's control and understanding. In the future, abuse of the
e exception to circumvent the thirty-day action requirement
l be viewed as a violation of this Decree.

6. Plaintiff Gladys Rodriguez and her minor children,
el, Francisco, William, and Miguel Rodriguz are entitled to
ward of AFDC assistance for the period from October 17, 1969,
November 30, 1969, inclusive. Plaintiff Mrs. Loretha Smith,
behalf of her minor children Steven Kelly, Debra Kelly, and
ond Kelly, is entitled to an award of AFDC assistance for
period from September 20, 1969, to December 12, 1969, in-
sive.

7. Section 8255.1 of the Illinois Categorical Assistance
al of the Illinois Department of Public Aid shall not be a
to the award of retroactive payments in accordance with the
s of this Decree, and further, that section shall be deemed
l and void and there shall be no bar to the award of assis-
e retroactive to the thirtieth day from the date of applica-

8. Article IV, Section II-8 of the Illinois Public Aid
shall not be a bar to any relief afforded by paragraph 3
this Decree.

9. Within fifteen (15) days from the date of this Decree,
ndant Harold O. Swank shall submit to the Court and the

paragraph 3 becomes effective, defendant Harold O. Swank shall submit to the Court an affidavit to the effect that the awards and letters required under paragraph 3 have in fact been mailed.

13. This Decree shall be binding upon Harold O. Swank, David Daniel, Edward J. Barrett, the Illinois Department of Public Aid, the Cook County Department of Public Aid, and the Cook County Comptroller's Office, their officers, agents, servants, employees, and their successors, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

14. This Court shall retain continuing jurisdiction over this cause for all purposes.

Enter:

/s/ Roger J. Kiley
Roger J. Kiley, Judge
United States Court of Appeals

BERNARD M. DECKER
/s/ Bernard M. Decker
Bernard M. Decker, Judge
United States District Court

/s/ Hubert L. Will
Hubert L. Will, Judge
United States District Court

DATED: OCT 28 1970

ANALYSIS OF REGISTERED APPLICATIONS PENDING INVESTIGATION
SOURCE: COOK COUNTY DEPARTMENT OF PUBLIC AID - FORM CCPA-264
NOVEMBER, 1970

APPLICATIONS PENDING INVESTIGATION	TOTAL		ADDAMS		ALTGELD		CABRINI		ENGLEWOOD		GARFIELD		HOMER		KENWOOD	
	NUMBER	PERCENT OF TOTAL	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT
TOTAL	3,848	100.0	11	100.0	7	100.0	15	100.0	159	100.0	22	100.0	3	100.0	381	100.0
ADC	376	100.0	2	100.0	1	100.0	12	100.0	15	100.0	1	100.0	-	-	7	100.0
AABD(A)	368	100.0	2	100.0	1	100.0	-	-	33	100.0	-	-	-	-	39	100.0
AABD(B)	36	100.0	-	-	1	100.0	-	-	1	100.0	3	100.0	-	-	5	100.0
AABD(D)	1,791	100.0	7	100.0	4	100.0	3	100.0	110	100.0	18	100.0	3	100.0	330	100.0
GA	1,277	100.0	-	-	-	-	-	-	-	-	-	-	-	-	-	-
LESS THAN 1 MONTH	1,430	37.2	2	18.2	3	42.8	14	93.3	28	17.6	5	22.7	-	-	16	4.2
ADC	359	95.5	2	100.0	1	100.0	12	100.0	15	100.0	1	100.0	-	-	7	100.0
AABD(A)	50	13.6	-	-	1	100.0	-	-	5	15.2	-	-	-	-	1	2.6
AABD(B)	4	11.1	-	-	1	100.0	-	-	-	-	1	33.4	-	-	-	-
AABD(D)	173	9.7	-	-	-	-	2	66.7	8	7.3	3	16.7	-	-	8	2.4
GA	844	66.1	-	-	-	-	-	-	-	-	-	-	-	-	-	-
1 MONTH AND LESS THAN 6 MONTHS	1,859	48.3	9	81.8	2	28.6	1	6.7	98	61.6	9	40.9	2	66.7	259	68.0
ADC	17	4.5	-	-	-	-	-	-	-	-	-	-	-	-	-	-
AABD(A)	235	63.9	2	100.0	-	-	-	-	21	63.6	-	-	-	-	28	71.8
AABD(B)	20	55.6	-	-	-	-	-	-	1	100.0	1	33.3	-	-	3	60.0
AABD(D)	1,231	68.7	7	100.0	2	50.0	1	33.3	76	69.1	8	44.4	2	66.7	228	69.1
GA	356	27.9	-	-	-	-	-	-	-	-	-	-	-	-	-	-
6 MONTHS AND OVER	559	14.5	-	-	2	28.6	-	-	33	20.8	8	36.4	1	33.3	196	27.8
ADC	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
AABD(A)	83	22.5	-	-	-	-	-	-	7	21.2	-	-	-	-	10	25.6
AABD(B)	12	33.3	-	-	-	-	-	-	-	-	1	33.3	-	-	2	40.0
AABD(D)	387	21.6	-	-	2	50.0	-	-	26	23.6	7	38.9	1	33.3	94	28.5
GA	77	6.0	-	-	-	-	-	-	-	-	-	-	-	-	-	-

EXHIBIT "D"
Page 1 of 8 Pages

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN JORDAN, by his next friend, JEANETTE BRYANT, individually, and on behalf of all other persons similarly situated, Plaintiffs,	)	
vs.	)	No. 71 C 70
HAROLD O. SWANK, Director, Illinois Department of Public Aid; DAVID DANIEL, Director, Cook County Department of Public Aid; EDWARD J. BARRETT, Comptroller of Cook County, individually and in their official capacities, Defendants.	)	

ORDER

This cause coming on for hearing on plaintiffs' motion for a temporary restraining order, and the defendants having received notice and being represented by counsel, and the Court having considered the affidavits, exhibits, and memorandum presented by plaintiffs, and also the representations and arguments of counsel for all parties, and being fully advised in the premises; and

The following findings of fact have been admitted by the Cook County Department of Public Aid:

63

1. Plaintiff John Jordan applied to the Cook County Department of Public Aid on September 18, 1970, for Aid to the Disabled under the Aid to the Aged, Blind, and Disabled (hereinafter "AABD") program; and

2. As of January 14, 1971, the application of John Jordan for AABD had not yet been acted upon by the Cook County Department of Public Aid, and John Jordan had received no assistance whatsoever;

3. Plaintiff, John Jordan, age sixty-one, with the assistance of his friends, cooperated in all respects with the Cook County Department of Public Aid, furnished all information requested by the Cook County Department of Public Aid, and has been and is eligible for AABD.

4. Numerous other persons have made applications for AABD to the Cook County Department of Public Aid and many such applications have been pending in excess of thirty days from the date of application as to aged and blind under AABD and in excess of sixty days as to disabled under AABD, with a number having been pending longer than six months;

5. Defendant Harold O. Swank is the Director of the Illinois Department of Public Aid and is charged with statewide administration of the categorical aid programs, including Aid to the Aged, Blind and Disabled, and with establishing regulations to carry out the statutory provisions of such programs. Defendant David Daniel is the Director of the Cook County Department of Public Aid, an agency of the Illinois Department of Public

Aid, and is responsible for administering the categorical aid programs, including AABD, in Cook County. Defendant Edward J. Barrett is the Comptroller of Cook County, responsible for the signing of emergency welfare checks in Cook County; and

The Court further finding:

6. The named plaintiff has brought this action as a class action on his own behalf and on behalf of all other persons in Illinois eligible for AABD who are required by defendants to wait longer than thirty days after application, as to aged and blind under AABD, and longer than sixty days after application as to disabled under AABD, for a determination of eligibility and receipt of their first assistance check.

7. This class is so numerous that joinder of all members is impracticable. There are questions of law and fact common to the class. The claims of plaintiff are typical of the claims of the class. Plaintiffs will fairly and adequately protect the interests of the class. The defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate injunctive relief with respect to the class as a whole.

8. Those persons composing this class are, and will continue to be, irreparable injured by the failure of the defendants to process their applications and to provide AABD assistance within the maximum time periods permissible under federal regulations. Plaintiff, John Jordan, does not have funds with

65

which to obtain proper and necessary food and clothing, and medical and dental care. The named plaintiff, John Jordan, is suffering, and will suffer immediate, certain, and irreparable injury by reason of the failure of the Cook County Department of Public Aid to approve his application and to provide him AABD.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties to this action and over the subject matter of the action.

2. The hereinabove findings of facts establish that the Cook County Department of Public Aid and the Illinois Department of Public Aid have not complied in Cook County with the Handbook of Public Assistance Administration, Part IV, Sections 2200(b)(3)(4), 2300(b)(3)(5), and the Court is at this time satisfied that plaintiffs are likely to prevail on the mandatory and binding nature of these regulations. Rodriguez v. Swank, 69 C 2615 (N. D. Ill., 1970) (three-judge court).

3. This action is properly maintainable as a class action. Federal Rules of Civil Procedure, 23(a) and (b).

4. Plaintiff and the class he represents will suffer immediate and irreparable injury if a temporary restraining order is denied.

5. Plaintiff and the class he represents are entitled to a temporary restraining order as hereinafter set forth.

The defendants hereby give their consent to the extension of this order until April 15, 1971. However, such consent to the extension of this order shall not be deemed to be a waiver by the defendants of any right to appeal this order or to move this Court at any time to vacate, stay, or dissolve this order.

Issued at 10:30 A.m., January 21 , 1971, nunc pro tunc, effective 12:01 p.m., January 15, 1971.

Alexander J. Karsh
United States District Judge

IT IS HEREBY ORDERED, ADJUDGED, and DECREED That the defendant David Daniel, as Director of the Cook County Department of Public Aid, and his employees are enjoined from failing to make a determination of eligibility on the AABD application of John Jordan any later than 4:30 p.m., Friday, January 15, 1971, and, in the event his application is approved, defendants are enjoined from failing to issue any later than 4:30 p.m., Friday, January 15, 1971, to John Jordan his AABD entitlement; and

IT IS FURTHER ORDERED That the defendants, their agents and employees, and all persons in active concert and participation with them, are hereby enjoined from failing to make determinations of eligibility and providing AABD assistance for those determined eligible, within thirty days from the date of application as to aged and blind applicants for AABD and within sixty days from the date of application as to disabled applicants for AABD in the State of Illinois except in those cases where it is impossible to make a determination of eligibility because of failure or delay on the part of the applicant to provide essential information within the applicant's control and understanding, pending final adjudication of this cause.

PROVIDED That defendants are hereby given until April 15, 1971, to act on all AABD applications now pending, and on all AABD (D) applications filed between the effective date of this Order and February 15, 1971, and on all AABD (A) and (B) applications filed between the effective date of this Order and March 15, 1971.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FILED

JAN 28 1971

H. STUART CUNNINGHAM
At _____ o'clock _____
CLERK

JOHN JORDAN, by his next friend, JEANETTE BRYANT, individually and on behalf of all other persons similarly situated,	)	
Plaintiffs,	)	
vs.	)	NO. 71 C 70
HAROLD O. SWANK, Director, Illinois Department of Public Aid; DAVID DANIEL, Director, Cook County Department of Public Aid; EDWARD J. BARRETT, Comptroller of Cook County, individually and in their official capacities,	)	
Defendants.	)	

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, EQUITABLE AND OTHER APPROPRIATE RELIEF

PRELIMINARY STATEMENT

1. Plaintiff, individually and on behalf of all other persons similarly situated, seeks primarily to have this Court declare mandatory and binding on the defendants federal regulations requiring (a) determinations of eligibility, and (b) actual receipt of Aid to the Aged, Blind and Disabled (hereinafter AABD) for those determined eligible, within thirty days from the date of application as to aged and blind applicants for AABD, and within sixty days from the date of application as to disabled applicants for AABD, and further declaring void all state statutes and regulations inconsistent with said mandatory federal regulations. Plaintiff also seeks

a declaration that the Illinois Public Aid Code, ch. 23, Section 3-1, Ill.Rev.Stat., federal law, 45 C.F.R. § 233.20(a)(1)(2)(iii), and equal protection of the laws as guaranteed by the fourteenth amendment to the United States Constitution, require AABD to be paid from the date of application if the applicant meets the eligibility conditions at the time of application.

JURISDICTION

2. Jurisdiction is conferred on this court by 28 U.S.C. § 1343(3)(4) and by 28 U.S.C. § 1331. The amount in controversy, exclusive of interest and costs, exceeds the sum or value of $10,000.00.

3. Plaintiff's action for declaratory and injunctive relief, and for benefits wrongfully withheld is authorized by:

(a) 28 U.S.C. §§ 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure, which relate to declaratory judgments;

(b) 42 U.S.C. § 1983 which provides redress for the deprivation under color of law of rights, privileges, and immunities secured by the Constitution and laws of the United States.

PLAINTIFFS

4. The named plaintiff, John Jordan, age sixty-one, lives at 4241 W. Calumet, Chicago, Illinois, in a room of the apartment of Jeanette Bryant.

5. John Jordan has a substantial mental deficiency

and functions at the level of a small child. Jeanette Bryant generally supervises most matters affecting the everyday life of John Jordan.

CLASS ACTION

6. The named plaintiff brings this action on his own behalf and pursuant to Rule 23(a) and (b) of the Federal Rules of Civil Procedure, on behalf of all other persons similarly situated.

DEFENDANTS

7. Defendants are as follows: (a) Harold O. Swank, is the Director of the Illinois Department of Public Aid and is charged with statewide administration of the public assistance programs, including Aid to the Aged, Blind and Disabled, and with establishing regulations to carry out the statutory provisions of such programs; (b) David Daniel is the Director of the Cook County Department of Public Aid, an agency of the Illinois Department of Public Aid, and is responsible for administering the public assistance programs in Cook County; and (c) Edward J. Barrett, is the Comptroller of Cook County, responsible for the signing of emergency welfare checks.

FACTUAL ALLEGATIONS

8. John Jordan has a substantial mental impairment and functions at the level of a small child. He is unable to

read or to recognize and count money. His intelligence is so limited that he requires supervision in most matters affecting his everyday life. His mental impairment is of a permanent nature and substantially impairs his ability to perform labor or services or to engage in any useful occupation.

9. On or about September 18, 1970 John Jordan applied for Aid to the Disabled at the Oakland office of the Cook County Department of Public Aid.

10. At the time of his application for Aid to the Disabled John Jordan met all of the eligibility conditions for Aid to the Disabled, and he still meets said eligibility conditions, and is in all ways qualified for such assistance.

11. John Jordan, or friends acting on his behalf, have cooperated with the Cook County Department of Public Aid in all respects and have furnished all information requested by the Cook County Department of Public Aid and its employees.

12. The Cook County Department of Public Aid has yet to act on John Jordan's application for Aid to the Disabled and John Jordan has not received any such assistance from the defendants as of the date of filing this law suit.

13. The sole reason for the delay is that the case-worker of the Cook County Department of Public Aid assigned to John Jordan's application has not had time to act on John Jordan's application.

14. John Jordan has no income or assets except for

the approximately $2.00 he earns by working at a drugstore one day a week and other infrequent odd jobs involving manual labor.

15. John Jordan is in dire need of monetary and medical assistance. He does not eat properly and is suffering from malnourishment because of lack of sufficient funds and is presently sick with a cold and cough and in need of medical care. Also he lacks vision in one eye and needs to be fitted for glasses.

16. Because his application for Aid to the Disabled has not been acted upon and approved, John Jordan has suffered and will continue to suffer irreparable injury, loss, and damage because of the lack of adequate funds to purchase those necessities requisite for a minimum standard of life compatible with health and well-being.

COUNT I

17. Count I is brought as a class action by the named plaintiff on his own behalf and on behalf of all other persons similarly situated pursuant to Rule 23(a) and (b) of the Federal Rules of Civil Procedure. The class is composed of all persons in Illinois eligible for Aid to the Aged, Blind, or Disabled, (AABD) who are required by defendants to wait longer than 30 days after application, as to aged and blind under AABD, and longer than 60 days after application, as to disabled under AABD, for a determination of eligibility and receipt of their first assistance check. This class is so numerous that joinder of all members is

impractical. There are questions of law and fact common to the class. The claims of plaintiff are typical of the claims of the class. Plaintiffs will fairly and adequately protect the interests of the class.

18. Illinois participates in the Federal government's Program of Aid to the Aged, Blind, and Disabled (AABD), established by the Social Security Act, 42 U.S.C. Subchapter XVI, §§ 1381 et. seq. As a condition thereof, Illinois is required to conform with the requirements of the Social Security Act and regulations promulgated thereunder by the United States Department of Health, Education and Welfare.

19. The Social Security Act provides that

> "all individuals wishing to make application under the (AABD) plan shall have opportunity to do so and that such aid or assistance shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 1382(a)(8).

20. At all times relevant herein, the regulations of the Department of Health, Education and Welafre have required that action on applications for assistance for the aged and blind under AABD be taken within thirty days, and action on applications for the disabled under AABD, be taken within sixty days, including for those determined eligible, the actual receipt of AABD assistance within the respective maximum time periods. Handbook of Public Assistance Administration, Part IV, Section 2200(b)(3)(4), Section 2300(b)(3)(5).

21. The defendants maintain that these abovementioned regulations are not mandatory and binding on them with respect to AABD applications.

22. As of the end of November, 1970, approximately 90% of the applications for assistance for the aged and blind under AABD made to the Cook County Department of Public Aid had been pending longer than 30 days. As of the end of November, 1970, approximately 70% of the applications for aid to the disabled under AABD made at the Cook County Department of Public Aid had been pending between one and six months and approximately 20% of the same applications had been pending for six months and over.

23. The rules and regulations of the defendant Illinois Department of Public Aid with respect to time standards for processing of AABD applications, Illinois Categorical Assistance Manual, Sections 4004-4004.3, are in violation of the requirements of the Social Security Act and regulations quoted above in paragraphs 19 and 20.

24. Further, at all times relevant herein, Section 8255 (and subsections thereunder), Illinois Department of Public Aid, Categorical Assistance Manual, has provided that initial grants (including AABD) may be authorized only for the month in which the application has been approved, but not for any prior months.

25. Pursuant to Section 8255, Illinois Categorical Assistance Manual, plaintiff John Jordan is barred from receiving AABD benefits for October, November, and December, 1970 in violation of the Social Security Act and regulations quoted above in paragraphs 19 and 20.

26. By failing to follow the maximum, permissible time standards under federal law (quoted above in paragraphs 19 and 20

the defendants and their agents acting under color of state law have unlawfully deprived plaintiffs of AABD assistance and their rights under the Social Security Act and the regulations issued pursuant thereto.

27. No adequate administrative remedy or remedy at law is available to the plaintiffs.

28. Plaintiffs have suffered irreparable damage to their health and well-being and will continue to suffer severe and irreparable injury because of the failure of defendants and their agents to comply with the respective 30 and 60 day requirements relating to AABD applicants.

COUNT II

29. Count II is brought as a class action by the named plaintiff on his own behalf and on behalf of all other persons similarly situated pursuant to Rule 23(a)(b) of the Federal Rules of Civil Procedure. The class is composed of all applicants for AABD in Illinois who meet the eligibility requirements when they apply but are denied benefits for the intervening period from the date of application to the month in which their grant is authorized. This class is so numerous that joinder of all members is impractical. There are questions of law and fact common to the class. The claims of plaintiff are typical of the claims of the class. Plaintiffs will fairly and adequately protect the interests of the class.

30. Some eligible applicants for AABD similarly situated to John Jordan applied for AABD benefits in September, 1970, and were determined eligible in said month and began receiving assistance in and for said month.

31. Some eligible applicants similarly situated to John Jordan applied for AABD benefits in September, 1970, and were determined eligible in October, some were determined eligible in November, and some were determined eligible in December, and as a consequence, said applicants began receiving assistance in and for October, November, and December respectively, but not for any period prior to the month in which they were determined eligible.

32. By delaying determinations of eligibility, the defendant lessen expenditures to the needy for basic subsistence payments.

33. To condition the date upon which AABD benefits begin to the speed of the administrative process, is to establish wholly arbitrary and invidious classifications between similarly situated, equally needy persons.

34. Section 8255 of the Illinois Categorical Assistance Manual is invalid and unconstitutional on its face and as applied to plaintiffs in violation of the equal protection clause of the fourteenth amendment to the Constitution of the United States.

35. The policy of the defendant Illinois Department of Publi Aid, and the practices of its 102 agent County Departments of Publi Aid throughout the State of Illinois, do not require AABD assistanc be paid from the date of application when the applicant meets all of the eligibility conditions at that time.

36. The policy and practices of the defendants described in paragraph 35 above and in this Count are in violation of the Socia Security Act, 42 U.S.C. § 1381 et. seq. and federal regulations issued thereunder, 45 C.F.R. § 233.20(a)(1)(2)(iii), and Departmen of Health, Education and Welfare Handbook of Public Assistance

Administration, Part II, § 3300, § 4300.

37. The policy and practices of the defendants described in paragraph 35 above and in this Count are in violation of the Illinois Public Aid Code, ch. 23, Section 3-1, Ill. Rev. Stat. which provides that financial aid

> "shall be given under this Article to or in behalf of aged, blind, or disabled persons who meet the eligibility conditions..."

38. Plaintiffs have suffered and will continue to suffer irreparable injury to their health and well-being because of the policy and practice of the defendants described in paragraph 35 above and in this Count.

39. No adequate administrative remedy or adequate remedy at law is available to plaintiffs.

WHEREFORE, plaintiff respectfully prays, on behalf of himself and all others similarly situated, that this Honorable Court:

1. Enter a temporary restraining order enjoining the defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them, from continuing to cause irreparable harm to plaintiff and other persons similarly situated by failing to make determinations of eligibility and providing AABD assistance for those determined eligible, within 30 days from the date of application as to aged and blind applicants for AABD, and within 60 days from the date of application as to disabled applicants for AABD.

2. Enter preliminary and permanent injunctions enjoining defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them, from failing to comply with the federal 30 and 60 day requirements with respect to applicants for AABD in the State of Illinois.

3. Enter a final judgment declaring Illinois Categorical Assistance Manual Sections 4004 and 8255 (and subsections thereuncer) as applied to applicants for AABD invalid insofar as they are inconsistent with the Social Security Act and regulations issued pursuant thereto.

4. Enter a final judgment declaring that the illinois public Aid Code, ch. 23, Sections 3-1, Ill. Rev. Stat., the Socia Security Act and regulations thereunder, and equal protection of the laws as guaranteed by the fourteenth amendment to the United States Constitution require that applicants for AABD who meet the eligibility conditions for AABD at the time of their application are entitled to AABD benefits from the date of application.

5. Enter a permanent injunction enjoining the defendants to award to the entire class of plaintiffs all AABD benefits wrongfully withheld.

6. Allow punitive damages in the amount of $100,000.00 against Harold O. Swank.

7. Allow plaintiff his costs herein, and also grant him and all persons similarly situated, such additional or alternative relief as may seem to this Court to be just, proper and equitable.

Respectfully submitted,

Sheldon Roodman

Kenneth K. Howell

Sheldon Roodman
Kenneth K. Howell
Community Legal Counsel
116 South Michigan Avenue
Chicago, Illinois 60603
726-0157

Attorneys for Plaintiffs

FILED

IN THE UNITED STATES DISTRICT COURTS 16 PM 4 33
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CLERK
U. S. DISTRICT COURT

OHN JORDAN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	NO. 71 C 70
	)	
AROLD O. SWANK, et al.,	)	
	)	
Defendants.	)	

ANSWER OF DEFENDANTS DANIEL AND BARRETT
TO PLAINTIFFS' AMENDED COMPLAINT

Now come the defendants, DAVID DANIEL, Director, Cook County Department of Public Aid, and, EDWARD J. BARRETT, Comptroller of Cook County, by their attorney, EDWARD V. HANRAHAN, State's Attorney of Cook County, Illinois, and for answer to plaintiffs' amended complaint state as follows:

1. No answer is necessary for paragraph One.

2. Paragraph Two is admitted.

3. Paragraph Three is admitted.

4. Paragraph Four is admitted.

5. Paragraph Five is admitted.

6. In response to Paragraph Six, these defendants deny that this action is properly brought pursuant to Rule 23 (a) and (b) of the Federal Rules of Civil Procedure.

7. In response to Paragraph Seven, these defendants admit the allegations as to them.

8. Paragraph Eight is Admitted.

9. Paragraph Nine is Admitted.

10. Paragraph Ten is Admitted.

11. Paragraph Eleven is denied.

12. In answering Paragraph Twelve, these defendants admit that when the original complaint in this action was filed, John Jordan had received no assistance. They deny that the Cook County Department of Public Aid has yet to act on Mr. Jordan's application and further state that the application has been approved and Mr. Jordan was given emergency assistance to provide support and maintenance until his first regular check under AABD will arrive.

13. Paragraph Thirteen is denied.

14. In response to Paragraph Fourteen, these defendants have no knowledge sufficient to form a belief as to the truth or falsity of the allegations; they therefore neither admit nor deny the same but demand strict proof thereof.

15. Paragraph Fifteen is immaterial insofar as John Jordan's application has been approved and a temporary restraining order has been entered in this action. Whatever is not

immaterial in Paragraph Fifteen is neither admitted nor denied due to a lack of knowledge on the part of these defendants and they demand strict proof of those allegations.

16. In response to Paragraph Sixteen, these defendants have no knowledge sufficient to form a belief as to the allegations; they therefore neither admit nor deny the same but demand strict proof thereof.

COUNT I

17. Paragraph Seventeen is denied.

18. In response to Paragraph Eighteen, these defendants admit that Illinois participates in the Federal Government's program of Aid to the Aged, Blind and Disabled (AABD) but state that they are only bound to conform to the requirements of the Social Security Act and regulations promulgated thereunder by the United States Department of Health, Education and Welfare where participation makes conforming to the above mandatory.

19. The language of the Social Security Act as Set out in Paragraph Nineteen is admitted.

20. Paragraph Twenty is denied.

21. Paragraph Twenty-One is admitted.

22. Paragraph Twenty-two is admitted.

23. Paragraph Twenty-Three is denied.

24. Paragraph Twenty-Four is admitted.

25. In response to Paragraph Twenty-Five, these defendants admit that by Section 8255, Illinois Categorical Assistance Manual, John Jordan is barred from receiving AABD benefits for October, November, and December, 1970 but deny that the bar to retroactive assistance is in violation of the Social Security Act and regulations quoted (sic) in paragraphs Nineteen and Twenty.

26. In response to Paragraph Twenty-Six, these defendants deny that they have unlawfully deprived plaintiffs (sic) of AABD assistance and their rights under the Social Security Act and the regulations issued pursuant thereto.

27. Paragraph Twenty-Seven is denied.

28. Paragraph Twenty-Eight is denied.

COUNT II

29. Paragraph Twenty-Nine is denied.

30. In response to Paragraph Thirty, these defendants have no knowledge sufficient to form a belief as to the truth or falsity of the allegations; they therefore neither admit nor deny the same, but demand strict proof thereof.

31. In response to Paragraph Thirty-One, these defendants have no knowledge sufficient to form a belief as to the truth or falsity of the allegations; they therefore neither admit nor deny the same, but demand strict proof thereof.

32. Paragraph Thirty-Two is denied.

33. Paragraph Thirty-Three is denied.

34. Paragraph Thirty-Four is denied.

35. Paragraph Thirty-Five is denied.

36. Paragraph Thirty-Six is denied.

37. In response to Paragraph Thirty-Seven the language of that part of the Illinois Public Aid Code which is set out is admitted; the balance of the allegations are denied.

38. Paragraph Thirty-Eight is denied.

39. Paragraph Thirty-Nine is denied.

AFFIRMATIVE DEFENSES

1. Plaintiff, a welfare applicant, may not maintain this action for welfare applicants have no property right in assistance. If the Cook County Department of Public Aid is violating Federal statutes or regulations in administering the welfare system, the proper party to bring an action is the Department of Health, Education and Welfare.

2. The regulations of the Department of Health, Education and Welfare upon which the amended complaint is based are not complied with, mandatory.

3. The regulations upon which the amended complaint is based were promulgated without notice or an opportunity to be heard by the Illinois and Cook County Department of Public Aid in violation of the Due Process Clause of the Fifth Amendment of the United States Constitution.

4. That the plaintiff in this case has failed to comply with available, Federally-dictated procedure available when an application for AABD is not acted upon with reasonable promptness. 42 USC 1382 (a) (4) requires that State plans for aid to the aged, blind and disabled:

> "(4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid or assistance under the plan is denied or is not acted upon with reasonable promptness."

Such a plan is in existence and plaintiff has failed to utilize it.

5. This is an improper class action since the facts concerning each application are different. Further, the one named plaintiff may not be a proper representative of both classes.

WHEREFORE, these defendants pray that this Court:

1. Strike plaintiffs' amended complaint and dismiss this action; or

2. Enter judgment in favor of the defendants.

EDWARD V. HANRAHAN
State's Attorney of Cook County

By: James A. Rooney

James A. Rooney
Assistant State's Attorney
500 Civic Center
Chicago, Illinois 60602
321-8760

#9

ANALYSIS OF REGISTERED APPLICATIONS PENDING INVESTIGATION
SOURCE: COOK COUNTY DEPARTMENT OF PUBLIC AID - FORM CCDA-264
DECEMBER, 1970

	TOTAL		ADDAMS		ARNOLD		GARFIELD		HUMBOLDT		GARFIELD		MORTIMER		REYNOLDS	
	NUMBER	PERCENT BY REGION	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT
	4,819	100.0	16	100.0	8	100.0	18	100.0	160	100.0	87	100.0	5	100.0	358	100.0
		100.0		100.0	3	100.0	13	100.0	28	100.0	36	100.0	1	100.0	18	100.0
		100.0	2	100.0	-	-	-	-	27	100.0	-	-	-	-	35	100.0
		100.0	-	-	1	100.0	1	100.0	-	-	3	100.0	-	-	8	100.0
		100.0	5	100.0	4	100.0	4	100.0	105	100.0	24	100.0	4	100.0	339	100.0
	1,008	100.0	-	-	-	-	-	-	-	-	24	100.0	-	-	-	-
	615	12.8	3	18.7	1	12.5	15	83.3	33	20.6	60	69.0	-	-	27	6.8
		32.4	3	33.3	-	-	13	100.0	25	89.3	35	97.2	-	-	5	27.8
		24.0	-	-	-	-	-	-	1	3.7	-	-	-	-	3	6.8
		47.5	-	-	-	-	41	100.0	-	-	-	-	-	-	-	-
		13.0	1	7	1	33.3	1	25.0	7	6.7	1	4.2	-	-	19	5.6
		80.0	4	-	-	-	-	-	-	-	24	100.0	-	-	-	-
	1,683	34.9	12	75.0	5	62.5	3	16.7	90	56.3	14	16.1	4	80.0	249	62.6
		21.6	6	66.7	3	100.0	-	-	3	10.7	1	2.8	1	100.0	13	72.2
		91.2	2	100.0	-	-	-	-	16	59.3	-	-	-	-	22	62.9
		30.0	-	-	1	100.0	-	-	-	-	2	66.7	-	-	3	50.0
	1,077	56.5	4	80.0	1	25.0	3	75.0	71	67.6	11	45.8	3	75.0	211	62.2
	220	17.4	-	-	-	-	-	-	-	-	-	-	-	-	-	-
	69	12.9	1	6.3	2	25.0	-	-	37	23.1	13	14.9	1	20.0	122	30.6
	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
	50	24.8	-	-	-	-	-	-	10	37.0	-	-	-	-	10	45.5
	9	22.5	-	-	-	-	-	-	-	-	1	33.3	-	-	3	50.0
	410	23.9	1	20.0	2	50.0	-	-	27	25.7	12	50.0	1	25.0	109	32.2
	12	2.6	-	-	-	-	-	-	-	-	-	-	-	-	-	-

ANALYSIS OF REGISTERED APPLICATIONS PENDING INVESTIGATION
ISSUED: COOK COUNTY DEPARTMENT OF PUBLIC AID - FORM CCPA-264

JANUARY, 1972

		ARLAND		ALGONQUIN		CARMINI		ENGLEWOOD		GARFIELD		HOYNE		IRVING	
		NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT
	1,872	20	100.0	13	100.0	14	100.0	159	100.0	158	100.0	2	100.0	428	100.0
		15	100.0	7	100.0	7	100.0	57	100.0	55	100.0	1	100.0	22	100.0
		2	100.0	-	-	1	100.0	19	100.0	3	100.0	-	-	35	100.0
		-	-	-	-	1	100.0	1	100.0	3	100.0	-	-	5	100.0
		5	100.0	6	100.0	5	100.0	82	100.0	31	100.0	1	100.0	366	100.0
		-	-	-	-	-	-	-	-	66	100.0	-	-	-	-
	4,302	7	35.0	9	69.2	5	35.7	37	23.3	100	63.3	1	50.0	34	8.0
		6	46.2	7	100.0	3	42.9	24	42.1	42	76.4	1	100.0	8	36.4
		-	-	-	-	1	100.0	4	21.1	3	100.0	-	-	4	22.2
		-	-	-	-	-	-	-	-	-	-	-	-	-	-
		1	20.0	2	33.3	1	20.0	9	11.0	8	25.8	-	-	22	6.0
		-	-	-	-	-	-	-	-	47	71.2	-	-	-	-
	2,055	8	40.0	3	23.1	9	64.3	87	54.7	45	28.5	1	50.0	250	58.4
		7	53.8	-	-	4	57.1	33	57.9	13	23.6	-	-	14	63.6
		1	50.0	-	-	-	-	7	36.8	-	-	-	-	22	62.9
		-	-	-	-	1	100.0	1	100.0	2	66.7	-	-	-	-
		-	-	3	50.0	4	80.0	46	56.1	11	52.5	1	100.0	214	58.8
		-	-	-	-	-	-	-	-	19	28.8	-	-	-	-
	704	5	25.0	1	7.7	-	-	35	22.0	13	8.2	-	-	144	33.6
		-	-	-	-	-	-	-	-	-	-	-	-	-	-
		1	50.0	-	-	-	-	8	42.1	-	-	-	-	9	40.9
		-	-	-	-	-	-	-	-	1	33.3	-	-	5	100.0
		4	80.0	1	16.7	-	-	27	32.9	12	38.7	-	-	120	38.3
		-	-	-	-	-	-	-	-	-	-	-	-	-	-

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

#10

JOHN JORDAN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 71 C 70
	)	
HAROLD O. SWANK, Et al.,	)	
	)	
Defendants.	)	

ANSWER OF DEFENDANT, HAROLD O. SWANK
DIRECTOR, ILLINOIS DEPARTMENT OF PUBLIC AID

Defendant, HAROLD O. SWANK, Director, Illinois Department of Public Aid, by his counsel, WILLIAM J. SCOTT, Attorney General of Illinois answers the respective paragraphs of the Plaintiffs' Complaint as follows:

1. A response is not required.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted.
6. Deny that this is a proper class section.
7. Admitted.
8. Admitted.
9. Admitted.
10. Admitted.
11. Denied.

12. Denied. The answering Defendant further avers that these Plaintiffs have received the relief they sought in the commencement of this section and therefore the issues are moot.

13. Denied.

14. This defendant has insufficient knowledge to admit or deny said allegation.

15. This Defendant has insufficient knowledge to admit or deny said allegation.

16. Denied.

COUNT I

17. Denied.

18. Admitted.

19. Admitted.

20. Denied.

21. Admitted.

22. Admitted.

23. Denied.

24. Admitted.

25. Deny that the treatment accorded Plaintiff is violative of the Social Security Act and regulations.

26. Denied.

27. Denied.

28. Denied.

COUNT II

29. Denied.

30. Admit that some applications in areas of the state are processed faster than others.

31. Admit that some areas of the state have processed applications swifter than others.

32. Denied.

33. Denied.

34. Denied.

35. Denied.

36. Denied.

37. Admit the existence of said statute but deny the remainder of this allegation, and further deny that said statute has been violated as to these plaintiffs.

38. Denied.

39. Denied.

Affirmative Defense

The part of Count II seeking punitive damages from Harold O. Swank, Director of the Department of Public Aid, fails to state a claim upon which relief can be granted.

Wherefore, this Defendant requests the entry of an Order dismissing the complaint and such other relief as is proper.

William J. Scott

WILLIAM J. SCOTT
Attorney General of Illinois
Attorney for the Defendant,
Harold O. Swank, Director,
Department of Public Aid
160 North LaSalle Street
Chicago, Illinois 60601
793-2590

Robert A. Maloney
Assistant Attorney General
of Counsel

STATE OF ILLINOIS)
) SS
COUNTY OF C O O K)

CERTIFICATE OF SERVICE

TO: Sheldon Roodman
Community Legal Counsel
116 South Michigan Avenue
Chicago, Illinois 60603

James A. Rooney
Assistant State's Attorney
500 Chicago Civic Center
Chicago, Illinois 60602

PLEASE TAKE NOTICE that on March 22, 1971 the attached Answer of Defendant Harold O. Swank was filed with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division.

William J. Scott

WILLIAM J. SCOTT
Attorney General of Illinois
Attorney for the Defendant,
Harold O. Swank, Director,
Department of Public Aid
160 North LaSalle Street
Chicago, Illinois 60601
793-2590

Robert A. Maloney
Assistant Attorney General
of Counsel

RECEIVED
MAR 5 1971
ALEXANDER J. NAPOLI
JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN JORDAN, et al.,)
)
Plaintiffs)
)
vs.) No. 71 C 70
)
HAROLD O. SWANK, et al.,)
)
Defendants.)

#11

REQUEST FOR PRODUCTION
OF DOCUMENTS

Plaintiff, John Jordan, hereby requests, pursuant to Rule 34 of the Federal Rules of Civil Procedure, that defendant David Daniel, Director, Cook County Department of Public Aid, produce and permit plaintiff to inspect and copy each of the following documents:

1. The entire case record of the Cook County Department of Public Aid pertaining to John Jordan, his application for AABD, and the disposition of said application.

2. Any and all letters, memoranda, reports, and studies since February, 1968, with respect to the procedures for processing of AABD applications and the problems related thereto, the procedures for making determinations of eligibility or ineligibility for AABD applicants and the problems related thereto, the length of time between the date of application and the date of authorization and/or mailing of the first check for those AABD

applicants determined eligible, and with respect to the time from which initial AABD benefits are to be payable to eligible AABD applicants.

3. Any and all correspondance, memoranda, or other written exchanges of information between the Cook County Department of Public Aid, and the Illinois Department of Public Aid with respect to any of the matters described in paragraph 2, supra, and with respect to the problem of meeting the maximum time limits established by the Department of Health, Education and Welfare for the processing of AABD applications.

It is requested that the aforesaid production be made on the 8th day of April, 1971, at 116 South Michigan, Room 700, at 10:00 a.m.

Sheldon H. Roodman
one of the
Attorneys for Plaintiffs

Community Legal Counsel
116 South Michigan Avenue
Chicago, Illinois 60603
726-0157

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN JORDAN, et al.,

Plaintiffs

vs.

HAROLD O. SWANK, et al.,

Defendants.

No. 71 C 70

NOTICE OF FILING

To: Attorney General
160 North LaSalle Street
Chicago, Illinois

State's Attorney
Civic Center, Room 500
Chicago, Illinois

PLEASE TAKE NOTICE, That on March 25, 1971, we filed with the Clerk of this Court plaintiffs' Request for Production of Documents, a copy of which request is attached hereto.

Sheldon H. Roodman
one of the
Attorneys for Plaintiffs

Community Legal Counsel
116 South Michigan Avenue
Chicago, Illinois 60603
726-0157

CERTIFICATE OF SERVICE

Sheldon H. Roodman hereby certifies that he is one of the attorneys for plaintiffs in the foregoing matter; and that copies of the attached Notice and Request referred to therein were served on the defendants by placing copies of same in postage prepaid envelopes addressed to the above addressees, and depositing same in the United States mailbox at 116 South Michigan, Chicago, Illinois, this 26 day of March, 1971.

Sheldon Roodman

Sheldon H. Roodman

DOCKETED

FILED
APR 5 - 1971
H. STUART CUNNINGHAM
At ____ o'clock ____
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN JORDAN, et al.,
Plaintiffs,
vs.
HAROLD O. SWANK, et al.,
Defendants.

No. 71 C 70

MOTION TO STRIKE CERTAIN PORTIONS OF DEFENDANTS' ANSWERS

Plaintiffs, by their attorneys, respectfully move for an order striking the defendants' answers to paragraphs 30 and 31 of plaintiffs' amended complaint or, in the alternative, deeming admitted the plaintiffs' averments in paragraphs 30 and 31. In support of their motion, plaintiffs submit the following memorandum.

Paragraphs 30 and 31 of the amended complaint read as follows:

> "30. Some eligible applicants for AABD similarly situated to John Jordan applied for AABD benefits in September, 1970, and were determined eligible in said month.
>
> "31. Some eligible applicants similarly situated to John Jordan applied for AABD benefits in September, 1970, and were determined eligible in October, some were determined eligible in November, and some were determined eligible in December, and as a consequence, said applicants began receiving assistance in and for October, November, and December respectively, but not for any period prior to the month in which they were determined eligible."

25

67 120

Defendant Harold O. Swank, Director, Illinois Department of Public Aid, answered these paragraphs as follows:

> "30. Admit that some applications in areas of the state are processed faster than others.
>
> "31. Admit that some areas of the state have processed applications swifter than others."

These answers are unresponsive to the averments in paragraphs 30 and 31, and either should be stricken, or the plaintiffs' averments in paragraphs 30 and 31 should be deemed admitted. Federal Rules of Civil Procedure, 8(d).

Defendant David Daniel, Director, Cook County Department of Public Aid, answered the averments in paragraphs 30 and 31 as follows:

> "30. In response to Paragraph Thirty, these defendants have no knowledge sufficient to form a belief as to the truth or falsity of the allegations; they therefore neither admit nor deny the same, but demand strict proof thereof.
>
> "31. In response to Paragraph Thirty-one, these defendants have no knowledge sufficient to form a belief as to the truth or falsity of the allegations; they therefore neither admit nor deny the same, but demand strict proof thereof.

Plaintiffs submit that the above quoted answer is not made in good faith and that such assertion of ignorance is a sham. It is peculiarly within the knowledge of the defendant David Daniel, Director, Cook County Department of Public Aid, when applications for AABD made in September, 1970, were disposed of. In Rodriguez v. Swank, defendant David Daniel produced detailed

information on the same issue with respect to "ADC" applications. Exhibit A attached hereto, entitled, "Disposition of ADC - Regular Applications Received by the Cook County Department of Public Aid During August, 1969."

Case law on this point clearly supports plaintiffs' motion. In American Photocopy Equipment Co. v. Rovico, Inc., 359 F.2d 745, 746-7 (7th Cir., 1966), a patent infringement case, the court stated:

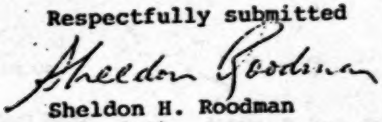
> "We hold that, in view of the existing circumstances, this failure of plaintiff to frankly reply on a matter, which it, as patent owner and manufacturer must have had within its knowledge, exhibits a lack of fairness which completely discredits its statement that it is without knowledge or information sufficient to form a belief as to the truth of said averment of defendant ... 'an answer asserting want of knowledge sufficient to form a belief as to the truth of facts alleged in a complaint does not serve as a denial if the assertion of ignorance is obviously sham. In such circumstances, the facts alleged in the complaint stand admitted.'"

A similar holding, often cited for the same proposition, is Ice Plant Equipment Co. v. Martocello, 43 F.Supp. 281, 282-83 (E.D. Pa., 1941):

> "Rule 8(b) of the Rules of Civil Procedure ... specifically authorizes a response of this kind [lack of knowledge or information sufficient to form a belief] and provides that it shall have the effect of a denial. The rule provides no exceptions. This court, however, has held in several cases that the rule does not apply if the fact as to which want of knowledge is asserted is to the knowledge of the court so plainly and necessarily within the defendant's knowledge that his averment of ignorance must be palpably untrue. In such case, the resort to the formal denial is plainly in bad faith and for the mere purpose of delay."

To the same effect, Mesirow v. Duggan, 240 F.2d 751, 756 (8th Cir. 1957).

Respectfully submitted



Sheldon H. Roodman
one of the
Attorneys for Plaintiffs

Community Legal Counsel
116 South Michigan Avenue
Chicago, Illinois 60603
726-0157

COOK COUNTY DEPARTMENT OF PUBLIC AID

To: Mr. Judson T. Murray, Assistant Chief — From: Shirley F. Mann, Supervisor

Address: Bureau of Resources and Legal Services — Address: Statistics and Analysis

In accordance with your request for statistical data relative to the pending legal case "Rodriquez vs. Swank, Federal District Court Case No. 69c 2615", we submit the following information regarding applications in Cook County for ADC-R for the month of August, 1969:

DISPOSITION OF ADC-REGULAR APPLICATIONS RECEIVED BY THE COOK COUNTY DEPARTMENT OF PUBLIC AID DURING AUGUST, 1969

	TOTAL		APPROVALS		DENIALS		Appr As Pe
	Number	Percent	Number	Percent	Number	Percent	Of Dispos
Total August Applications Received	2,259	100.0					
Disposition Effective 8/69	651	28.8	518	33.7	133	39.1	79
Disposition Effective 9/69	677	30.0	563	36.6	114	33.5	83
Disposition Effective 10/69	386	17.1	321	20.9	65	19.1	83
Disposition Effective 11/69	148	6.6	121	7.9	27	7.9	81
Disposition Effective 12/69	14	0.6	13	0.9	1	0.4	
Total Dispositions Made			1,536	100.0	340	100.0	81
Total August Applications Undisposed of at the end of November, 1969	383	16.9					

EXHIBIT "A" — 71 124

DOCKETED

FILED

APR 5 - 1971

H. STUART CUNNINGHAM
At_____ o'clock_____
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN JORDAN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 71 C 70
	)	
HAROLD O. SWANK, et al.,	)	
	)	
Defendants.	)	

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, by their attorneys, respectfully move for the entry of a preliminary injunction enjoining the defendants from failing to mail AABD checks or notifications of denial of AABD assistance for aged or blind applicants for AABD any later than thirty days after the date of application and for disabled applicants for AABD any later than sixty days after the date of application, as required by 45 C.F.R. § 206.10, published in 36 Fed. Reg. 3864-65 (Feb. 27, 1971), until this case is finally adjudicated, based upon the affidavit and exhibits filed in support of plaintiff's earlier motion for a temporary restraining order and based upon the defendant David Daniel's submissions to the Court of the December 1970, January and February 1971, reports entitled, Analysis of Registered Applications Pending Investigation, Source : Cook County Department of Public Aid - Form CCPA-264.

Sheldon Roodman

Sheldon H. Roodman
one of the Attorneys for Plaintiffs

Community Legal Counsel
116 S. Michigan Ave.
Chicago, Illinois 60603
726-0157

72 127

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UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
DOCKET EASTERN DIVISION

Name of Presiding Judge, Honorable ALEXANDER J. NAPOLI

Cause No. 71C 70 Date APR 15 1971

Title of Cause John Jordan, et al -vs- Harold O. Evans, et al

Brief Statement of Motion Motion to strike certain portions of defendants answers, or, in the alternative, to deem admitted paragraphs 30 and 31 of plaintiff's amended complaint

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and addresses of following counsel

Representing

Names and addresses of other counsel entitled to notice and names of parties they represent.

Reserve space below for notations by minute clerk

Paragraphs 30 and 31 of plaintiffs amended complaint are deemed admitted.

JJ

Memorandum to the Clerk.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHEPN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN JORDAN, by his next friend, JEANETTE BRYANT, individually, and on behalf of all other persons similarly situated,	)	
Plaintiffs,	)	
vs.	)	No. 71 C 70
HAROLD O. SWANK, Director, Illinois Department of Public Aid; DAVID DANIEL, Director, Cook County Department of Public Aid; EDWARD J. BARRETT, Comptroller of Cook County, individually and in their official capacities,	)	
Defendants.	)	

This matter coming on for hearing on plaintiffs' motion for a preliminary injunction on Count I of the amended complaint, and the defendants having received notice and being represented by counsel, and the Court having considered the amended complaint, affidavits, exhibits, and memoranda presented by plaintiffs, answers and exhibits of the defendants, and also the representations and arguments of counsel for all parties in open court, and being fully advised in the premises; it makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff John Jordan applied to the Cook County Department of Public Aid on September 18, 1970, for Aid to the

Disabled under the Aid to the Aged, Blind and Disabled (hereinafter "AABD") program; and

2. Plaintiff, John Jordan, age sixty-one, with the assistance of his friends, cooperated in all respects with the Cook County Department of Public Aid, furnished all information requested by the Cook County Department of Public Aid, and has been and is eligible for AABD;

3. As of January 14, 1971, the application of John Jordan for AABD had not yet been acted upon by the Cook County Department of Public Aid, and John Jordan had received no assistance whatsoever;

4. Pursuant to the temporary restraining order previously entered by this Court, John Jordan was determined eligible for AABD(D) and was issued AABD assistance. John Jordan was granted AABD assistance for the month of January, 1971 but no assistance for any period prior to January 1, 1971;

5. Numerous other persons have made applications for AABD to the Cook County Department of Public Aid and many such applications have been pending in excess of thirty days from the date of application as to aged and blind ander AABD and in excess of sixty days as to disabled under AABD, with a number having been pending longer than six months;

6. Defendant Harold O. Swank is the Director of the Illinois Department of Public Aid and is charged with statewide administration of the categorical aid programs, including Aid to

the Aged, Blind and Disabled, and with establishing regulations to carry out the statutory provisions of such programs. Defendant David Daniel is the Director of the Cook County Department of Public Aid, an agency of the Illinois Department of Public Aid and is responsible for administering the categorical aid programs, including AABD, in Cook County. Defendant Edward J. Barrett is the Comptroller of Cook County, responsible for the signing of emergency welfare checks in Cook County; and

7. The named plaintiff has brought this Count I as a class action on his own behalf and on behalf of all other persons in Illinois eligible for AABD who are required by defendants to wait longer than thirty days after application, as to aged and blind under AABD, and longer than sixty days after application as to disabled under AABD, for a determination of eligibility and receipt of their first assistance check.

8. This class is so numerous that joinder of all members is impracticable. There are questions of law and fact common to the class. The claims of plaintiff are typical of the claims of the class. Plaintiffs will fairly and adequately protect the interests of the class. The defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate injunctive relief with respect to the class as a whole.

9. Those persons composing this class are, and will continue to be, irreparably injured by the failure of the defen-

dants to process their applications and to provide AABD assistance within the maximum time periods permissible under federal regulations in that they lack sufficient funds to obtain necessary food, clothing, housing and medical care.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties to this action and over the subject matter of the action.

2. The hereinabove findings of facts establish that the Cook County Department of Public Aid and the Illinois Department of Public Aid have not complied with the Handbook of Public Assistance Administration, Part IV, Sections 2200(b)(3)(4), 2300 (b)(3)(5) and 45 C.F.R. §206.10(a)(3), 36 Fed. Reg. 3864 (February 27, 1971) and the Court is at this time satisfied that plaintiffs are likely to prevail on the mandatory and binding nature of these regulations. Rodriguez v. Swank, 318 F.Supp. 289 (N.D. Ill., 1970) (three judge court).

3. Count I of this action is properly maintainable as a class action as defined in paragraph 7 supra. Federal Rules of Civil Procedure, 23(a) and (b).

4. Plaintiff and the members of the class will suffer immediate and irreparable injury if preliminary injunctive relief is denied.

5. Plaintiff and the class he represents are entitled to a preliminary injunction as hereinafter set forth.

PRELIMINARY INJUNCTION

IT IS ORDERED, ADJUDGED, and DECREED that the defendants, their agents and employees, and all persons in active concert and participation with them, are hereby enjoined from failing to make determinations of eligibility and mailing either AABD assistance or notifications of denial of assistance, within thirty days from the date of application as to aged and blind applicants for AABD, and within sixty days from the date of application as to disabled applicants for AABD in the State of Illinois except in those cases where it is impossible to make a determination of eligibility because of failure or delay on the part of the applicant to provide essential information within the applicant's control and understanding.

IT IS FURTHER ORDERED, that the entitlement of all eligible AABD applicants in the State of Illinois shall attach no later than the thirtieth (30th) day after application as to aged and blind applicants, and no later than the sixtieth (60th) day after application as to disabled applicants. In any case in which eligibility is determined subsequent to the thirtieth (30th) day or sixtieth (60th) day, respectively, the applicant shall be entitled to AABD assistance retroactive at the very least to the thirtieth (30th) day or sixtieth (60th) day respectively, except in those cases where it was impossible to make a determination of eligibility because of failure or delay on the part of the applicant to provide essential information. In such latter cases, said applicants must receive a written statement explaining (a) that

the denial was based on the failure or delay on the part of the applicant to provide specified essential information, and (b) that the applicant has the right to appeal within sixty (60) days this decision of the County Department of Public Aid.

IT IS FURTHER ORDERED, to the extent that the Illinois Department of Public Aid, Categorical Assistance Manual, Sections 4004, 8255, and 8256, and subsections thereunder, are contrary to this preliminary injunction, these sections are contrary to federal law, and are hereby declared null and void.

IT IS FURTHER ORDERED that defendants award John Jordan his entitlement to AABD assistance as hereinabove defined.

IT IS FURTHER ORDERED that this preliminary injunction be and remain in full force and effect until final hearing of this cause and until further order of this Court.

ENTER: Alexander J. Napoli
United States District Judge

DATED: April 16, 1971.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN JORDAN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 71 C 70
	)	
HAROLD O. SWANK, et al.,	)	
	)	
Defendants.	)	

#16

MOTION FOR ORDER FOR PRODUCTION OF DOCUMENTS FOR INSPECTION AND COPYING

Plaintiff, by his attorney, moves the Court, pursuant to Rule 37(a) of the Federal Rules of Civil Procedure, for an order requiring defendants Harold O. Swank and David Daniel to produce and permit plaintiff to inspect and copy each of the following documents:

With respect to Harold O. Swank

1. Any and all letters, records, or other data pertaining to John Jordan, his application for AABD, and the disposition of said application;

2. Any and all letters, memoranda, reports, studies, manual releases, official bulletins, or other transmittals since February, 1968, with respect to the procedures for processing of AABD applications and the problems related thereto, the procedures for making determinations of eligibility or ineligibility for AABD applicants and the problems related thereto, the length of time between the date of application and the date of dispo-

sition of AABD applicants in all counties of the State of Illinois, and with respect to the time from which initial AABD benefits are to be payable to eligible AABD applicants;

3. Any and all correspondence, memoranda, or other written exchanges of information between any of the county departments of public aid in the State of Illinois and the Illinois Department of Public Aid with respect to any of the matters described in paragraph 2, supra, and with respect to the problem of meeting the maximum time limits established by the Department of Health, Education and Welfare for the processing of AABD applications;

4. Any and all correspondence, reports, or other exchanges of information between the Illinois Department of Public Aid and the Department of Health, Education and Welfare with respect to the state requirements for promptness in processing AABD applications, the actual performance of the county departments of public aid in the State of Illinois in processing AABD applications, and the time from which initial AABD benefits are to be payable to eligible AABD applicants. This request includes all exchanges of letters and written information between the Illinois Department of Public Aid and the Department of Health, Education and Welfare in connection with the petition of the Chicago Welfare Rights Organization calling for a HEW conformity hearing dealing with the matters described in the foregoing sentence.

With respect to David Daniel

1. The entire case record of the Cook County Department of Public Aid pertaining to John Jordan, his application for AABD, and the disposition of said application.

2. Any and all letters, memoranda, reports, and studies since February, 1968, with respect to the procedures for processing of AABD applications and the problems related thereto, the procedures for making determinations of eligibility or ineligibility for AABD applicants and the problems related thereto, the length of time between the date of application and the date of authorization and/or mailing of the first check for those AABD applicants determined eligible, and with respect to the time from which initial AABD benefits are to be payable to eligible AABD applicants.

3. Any and all correspondence, memoranda, or other written exchanges of information between the Cook County Department of Public Aid, and the Illinois Department of Public Aid with respect to any of the matters described in paragraph 2, supra, and with respect to the problem of meeting the maximum time limits established by the Department of Health, Education and Welfare for the processing of AABD applications.

Plaintiff did previously, on the 26th day of March, 1971, pursuant to Rule 34, Federal Rules of Civil Procedure, serve requests upon defendants Swank and Daniel for the above discovery and inspection. Defendants Swank and Daniel have

failed to serve any written response whatsoever upon the plaintiff to this time. Defendants Daniel and Swank have the possession, custody, or control of each of the foregoing documents. Each of them constitutes or contains evidence relevant and material to a matter involved in this action.

WHEREFORE, pursuant to Rules 34 and 37, Federal Rules of Civil Procedure, plaintiff respectfully moves for an order compelling the defendants Swank and Daniel to produce the above described documents.

Sheldon Roodman

Community Legal Counsel
116 South Michigan Avenue
Chicago, Illinois 60603
726-0157

Attorney for Plaintiff

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Judge Alexander Napoli (#17)

Cause No. 71 C 70 Date June 23, 1971

Title of Cause John Jordan, et al., v. Harold O. Swank, et al.

Brief Statement of Motion Motion for Order for Production of Documents for Inspection and Copying

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and addresses of moving counsel Sheldon H. Roodman, Community Legal Counsel, 116 South Michigan Avenue, Chicago, Illinois 60603

Representing Plaintiffs

Names and addresses of other counsel entitled to notice and names of parties they represent. Attorney General, 160 N. LaSalle Street, Chicago, Illinois
State's Attorney, Civic Center, Room 500, Chicago, Illinois
Representing defendants

Reserve space below for notations by minute clerk

Plaintiff's motion for production of documents for inspection and copying is granted.
Monthly reports are to be filed by defendants.
Cause is continued to Sept. 30, 1971 at 10:00 A.M. for further report on status.

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

DOCKETED

FILED
JUL 27 1971
H. STUART CUNNINGHAM
At ____ o'clock ____
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN JORDAN, et al.,
Plaintiffs,
vs.
HAROLD O. SWANK, et al.,
Defendants.

No. 71C 70

MOTION FOR ORDER THAT FACTS BE TAKEN AS ESTABLISHED

The defendant Harold O. Swank, Director, Illinois Department of Public Aid, having failed to comply with this Court's order of June 23, 1971, that said defendant produce certain records and documents for plaintiffs' inspection and copying, plaintiffs now move, pursuant to Rule 37(b)(2) and (d), Federal Rules of Civil Procedure, for an order establishing as proven the following facts:

1. In February, 1968, Harold O. Swank, Director, Illinois Department of Public Aid received from the Department of Health, Education and Welfare, Handbook Transmittal No. 139, attached hereto as Exhibit A, and knew and understood that the new federal requirement (Handbook of Public Assistance Administration, Part IV, Sections 2200(b)(3) and 2300(b)(5)) for a uniform thirty day maximum for action on AABD applications was mandatory and binding on the Illinois Department of Public Aid and that it would be

168

effective July 1, 1968.

2. In response to the new federal promptness requirement to be effective July 1, 1968, Harold O. Swank issued Manual Release No. 68.8, effective July 1, 1968, revising Section 4004.1 of the Illinois Categorical Assistance Manual to provide:

"4004.1 Time Standard

> Except for DA and MA-NG(D) cases which have a time standard of 45 days, the time standard for disposition of applications is 30 days from the date of application to the date the applicants are determined eligible and the effective date of their first assistance or are determined ineligible and receive a notice of denial of assistance...."

3. From July 1, 1968 to the present, Harold O. Swank has been fully advised and known that substantial numbers of applicants for AABD in the numerous counties of the State of Illinois have not had their applications acted upon and disposed of within the federally prescribed time maximums, and that these delays were not based on failure or delay on the part of the applicants; and for substantial numbers of these AABD applicants determined eligible, the effective date of their first assistance was not on or before 30 days from the date of their application, or, for disability applicants, on or before 45 days from the date of their application.

4. From July 1, 1968 to the present, Harold O. Swank, Director, Illinois Department of Public Aid, was fully advised and knew and understood that substantial numbers of eligible AABD applicants in the numerous counties of the State of Illinois were being denied their entitlement to AABD assistance effective 30 days from the date of their application, or, with respect to disability applicants,

effective 45 days from the date of their application, by the operation, implementation, and enforcement of Sections 8255 and 8255.1 of the Illinois Categorical Assistance Manual which prohibited the authorization of AABD assistance for any months prior to the month in which the application was approved.

5. From July 1, 1968 to the present, Harold O. Swank, willfully and in gross disregard of the rights of eligible AABD applicants, knew that substantial numbers of eligible AABD applicants were being deprived, contrary to the requirements of federal law, of their full AABD entitlements effective 30 days from the date of their application, or, with respect to disability applicants, 45 days from the date of their application, by reason of the operation, implementation and enforcement of Sections 8255 and 8255.1 of the Illinois Categorical Assistance Manual.

6. From July 1, 1968 to the present, Harold O. Swank, Director, Illinois Department of Public Aid, knew that as result of the operation, implementation, and enforcement of Sections 8255 and 8255.1 of the Illinois Categorical Assistance Manual that the amount of assistance in initial grants and the eligibility conditions for initial grants for AABD applicants were not made on an equitable and consistent basis and resulted in inequitable and arbitrary treatment of eligible AABD applicants in similar circumstances contrary to the purposes of the Social Security Act.

In addition to the foregoing, the plaintiff herein, pursuant to Rule 37 of the Federal Rules of Civil Procedure, moves the court

for such other and further orders as seem just under the circumstances, including plaintiffs' reasonable expenses, including attorneys' fees, incurred in connection with this motion and the earlier motion of June 23, 1971.

This motion is based on the record herein and upon the affidavit, attached hereto as Exhibit B, of Sheldon Roodman, one of the attorneys for the plaintiffs.

Respectfully submitted,

Sheldon Roodman
One of the attorneys for
plaintiffs.

COMMUNITY LEGAL COUNSEL
116 South Michigan Avenue
Chicago, Illinois 60603
726-0157

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Judge Alexander Napoli

Cause No. 71 C 70 Date July 27, 1971

Title of Cause John Jordan, et al., vs. Harold O. Swank, et al.

Brief Statement of Motion Motion For Order That Facts Be Taken As Established

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel Sheldon H. Roodman, Community Legal Counsel, 116 South Michigan Avenue, Chicago, Illinois 60603

Representing Plaintiffs

Names and Addresses of other counsel entitled to notice and names of parties they represent. Attorney General of Illinois, 160 N. LaSalle St., Chicago, Att'n: Robert Maloney
State's Attorney, Room 500 Civic Center, Chicago, Att'n: James Rooney

Representing Defendants

Reserve space below for notations by minute clerk

28 1971

oli J.

Plaintiff's motion for order that facts be taken as established is granted. Request for costs and attorneys fees is denied.

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

AT END OF FOURTH BY DATE OF APPLICATION

MAY 1971

AABD AGED MAG

COUNTY OR DISTRICT OFFICE	NUMBER OF APPLICATIONS DISPOSED OF DURING MONTH	LENGTH OF TIME APPLICATION WAS PENDING									
		WITHIN 2 DAYS	3-10 DAYS	11-30 DAYS	31-60 DAYS	61-90 DAYS	91-120 DAYS	121-150 DAYS	151-180 DAYS	6-9 MNTHS	9-MNTHS OR OVER
0 200 NURS. HOME	42	5	5	13	7	1				1	5
0 201 WESTERN	25	2	7	8	7						1
0 202 MICHIGAN	43	19	18	6							
0 203 OAKLAND	37	1	7	17	2	1		1	1	1	6
0 204 NORTHERN	106	28	25	36	15	2					
0 205 PARK MANOR	22		2	5	10	3				2	
0 206 KENWOOD	63	5	8	19	17	6	2		2	1	3
0 207 MADISON	24	10	4	2	2	3	1				2
0 208 ENGLEWOOD	33	2	8	12	8	1				2	2
0 209 GA OFFICE	21			11	8		1		1		
0 212 KOOGLAWN	18	7	6	2	1		1			1	
0 213 R TAYLOR H	1			1							
0 214 OAK FOREST	3			2						1	
0 215 GARFIELD	13		3	6	3						1
0 216 CABRINI HM	2			1				1			
0 217 WICKER PRK	50	20	17	6	4	1		1			1
0 218 SOUTHERN	54	3	7	20	24						
0 220 IDA B WELL	2			1	1						
0 222 RO WELL G	2		1	1							
[illegible]	1			2		1					

90

72

MAY 1971

AABD AGED MAG

COUNTY OR DISTRICT OFFICE	NUMBER OF APPLICATIONS DISPOSED OF DURING MONTH	LENGTH OF TIME APPLICATION WAS PENDING									
		WITHIN 2 DAYS	3-10 DAYS	11-30 DAYS	31-60 DAYS	61-90 DAYS	91-120 DAYS	121-150 DAYS	151-180 DAYS	6-9 MNTHS	9-MNTHS OR OVER
0 225 STATEWAY G	1					1					
0 226 S SUBURBAN	24	2	2	11	5	4					
0 227 HOSP AP SV	5		1	2		1	1				
0 228 LOW. NORTH	21	1	5	8	4					1	2
0 229 N SUBURBAN	18	1	3	6	8						
REGION TOTALS	635	106	129	203	126	25	6	3	4	10	23
COOK TOTALS	635	106	129	203	126	25	6	3	4	10	23
1 015 BUREAU	1	1									
1 037 FULTON	2			1	1						
1 045 HENRY	4			3	1						
1 056 KNOX	1		1								
1 067 MARSHALL	1		1								
1 080 PEORIA	17	5	2	8	1	1					
1 089 ROCK ISLAN	5		1	4							
1 095 STARK	1		1								
1 098 TAZEWELL	2	1			1						
REGION TOTALS	34	7	6	16	4	1					
2 019 CHAMPAIGN	9	5		4							
2 021 CLARK	3			1							
[illegible]	[illegible]										

MAY 1971

AABD AGED MAG

COUNTY OR DISTRICT OFFICE	NUMBER OF APPLICATIONS DISPOSED OF DURING MONTH	LENGTH OF TIME APPLICATION WAS PENDING									
		WITHIN 2 DAYS	3-10 DAYS	11-30 DAYS	31-60 DAYS	61-90 DAYS	91-120 DAYS	121-150 DAYS	151-180 DAYS	6-9 MNTHS	9-MNTHS OR OVER
2 031 EDGAR	2			2							
2 033 EFFINGHAM	4	1	1	1	1						
2 046 IROQUOIS	2	1		1							
2 054 KANKAKEE	26	2	2	3	4	3			2	5	5
2 063 MACON	6	1	2	3							
2 072 MCLEAN	1			1							
2 094 SHELBY	2		2								
REGION TOTALS	58	10	8	18	5	3	2		2	5	5
3 010 ADAMS	10	3	3	1	3						
3 014 BROWN	3			3							
3 016 CASS	3	1		2							
3 020 CHRISTIAN	4			4							
3 036 GREENE	3		1	2							
3 042 HANCOCK	2			2							
3 050 JERSEY	3	1	1	1							
3 062 LOGAN	1			1							
3 064 MACOUPIN	1				1						
3 076 MONTGOMERY	1			1							
3 077 MORGAN	4		1	1	1					1	
3 083 PIKE	2	1									

AABD AGED MAG

COUNTY OR DISTRICT OFFICE	NUMBER OF APPLICATIONS DISPOSED OF DURING MONTH	LENGTH OF TIME APPLICATION WAS PENDING									
		WITHIN 2 DAYS	3-10 DAYS	11-30 DAYS	31-60 DAYS	61-90 DAYS	91-120 DAYS	121-150 DAYS	151-180 DAYS	6-9 MNTHS	9-MNTHS OR OVER
3 091 SANGAMON	16	2	3	11	2						
REGION TOTALS	55	8	10	29	7					1	
4 012 BOND	1			1							
4 025 CRAWFORD	2	2									
4 034 FAYETTE	1			1							
4 049 JEFFERSON	6	1		2	3						
4 059 LAWRENCE	2	1		1							
4 065 MADISON	14	4	7	2	1						
4 066 MARION	3			3							
4 088 RICHLAND	1			1							
4 096 ST CLAIR	27	5	8	13	1						
4 104 WAYNE	1		1								
REGION TOTALS	58	13	16	24	5						
5 011 ALEXANDER	2		1	1							
5 036 FRANKLIN	7	3	2		2						
5 041 HAMILTON	2	1	1								
5 047 JACKSON	1			1							
5 069 MASSAC	5	1	3	1							
5 090 SALINE	2		1		1						
5 099 UNI	3			2							

COUNTY OR DISTRICT OFFICE	NUMBER OF APPLICATIONS DISPOSED OF DURING MONTH	LENGTH OF TIME APPLICATION WAS PENDING: WITHIN 2 DAYS	3-10 DAYS	11-30 DAYS	31-60 DAYS	61-90 DAYS	91-120 DAYS	121-150 DAYS	151-180 DAYS	6-9 MNTHS	9-MNTHS OR OVER
5 105 WHITE	1		1								
5 108 WILLIAMSON	2	1	1								
REGION TOTALS	25	6	11	5	3						
6 013 BOONE	3		1		2						
6 017 CARROLL	1		1								
6 027 DEKALB	1		1								
6 030 DUPAGE	11	2	3	3	1		1			1	
6 051 JO DAVIESS	1		1								
6 053 KANE	19			6	9	2	1		1		
6 055 KENDALL	2		1	1							
6 057 LAKE	13	4	1	4	2					2	
6 058 LA SALLE	4	2			1						1
6 060 LEE	4			3		1					
6 071 MCHENRY	1		1								
6 079 OGLE	2			2							
6 097 STEPHENSON	4		4								
6 106 WHITESIDE	1			1							
6 107 WILL	8	2	3	2		1					
6 109 WINNEBAGO	18	3	3	10	1					1	
REGION TOTALS	93	13		32	16	4		1		4	1

FORMAT 2. MONTHLY REPORT OF DISPOSED APPLICATIONS AT END OF MONTH BY DATE OF APPLICATION

MAY 1971

AABD AGED MAG

COUNTY OR DISTRICT OFFICE	NUMBER OF APPLICATIONS DISPOSED OF DURING MONTH	LENGTH OF TIME APPLICATION WAS PENDING									
		WITHIN 2 DAYS	3-10 DAYS	11-30 DAYS	31-60 DAYS	61-90 DAYS	91-120 DAYS	121-150 DAYS	151-180 DAYS	6-9 MNTHS	9-MNTHS OR OVER
DOWNSTATE TOTALS	323	57	71	124	40	8	4	1	2	10	6
STATE TOTALS	958	163	200	327	166	33	10	4	6	20	29

MAY 1971

AABD BLIND MAG

COUNTY OR DISTRICT OFFICE	NUMBER OF APPLICATIONS DISPOSED OF DURING MONTH	LENGTH OF TIME APPLICATION WAS PENDING: WITHIN 2 DAYS	3-10 DAYS	11-30 DAYS	31-60 DAYS	61-90 DAYS	91-120 DAYS	121-150 DAYS	151-180 DAYS	6-9 MNTHS	9-MNTHS OR OVER
0 201 WESTERN	1				1						
0 203 OAKLAND	1				1						
0 204 NORTHERN	1		1								
0 206 KENWOOD	1		1								
0 207 MADISON	4	3	1								
0 208 ENGLEWOOD	1			1							
0 215 GARFIELD	1								1		
0 217 WICKER PRK	1		1								
0 218 SOUTHERN	1	1									
0 221 PEN HORNER	1					1					
0 222 ROCKWELL G	1									1	
0 228 LOW. NORTH	4	1		3							
REGION TOTALS	18	5	4	4	2	1			1	1	
COOK TOTALS	18	5	4	4	2	1			1	1	
1 080 PEORIA	5		1		1	1	1	1			
REGION TOTALS	5		1		1	1	1	1			
2 054 KANKAKEE	1						1				
2 072 MCLEAN	1			1							
2 100 VERMILION	2		1	1							
REGION TOTALS	4		2	1			1				

AABD DISABLED MAG

COUNTY OR DISTRICT OFFICE	NUMBER OF APPLICATIONS DISPOSED OF DURING MONTH	LENGTH OF TIME APPLICATION WAS PENDING									
		WITHIN 2 DAYS	3-10 DAYS	11-30 DAYS	31-60 DAYS	61-90 DAYS	91-120 DAYS	121-150 DAYS	151-180 DAYS	6-9 MNTHS	9-MNTHS OR OVER
C 200 NLRS. HOME	175	9	6	35	73	41	1	4		2	4
O 201 WESTERN	172	20	45	57	19	5	3	4	3	9	7
O 202 MICHIGAN	177	64	71	35	3			1	1	1	1
O 203 OAKLAND	132	5	44	38	18	6	1		1	1	18
O 204 NORTHERN	412	180	127	61	38	1	1			4	
O 205 PARK MANOR	79	14	8	29	21	3	4				
O 206 KENWOOD	173	16	51	43	28	16	5	5	4	4	1
O 207 MADISON	232	134	35	22	13	9	12	1	1	3	2
O 208 ENGLEWOOD	189	14	47	86	28	4	1			6	3
O 209 GA OFFICE	58	1	9	21	21	3	3				
O 212 WOODLAWN	26	7	8	4	6					1	
O 213 R TAYLOR H	6	1		3			1				1
O 214 OAK FOREST	8	2	2	1			2		1		
O 215 GARFIELD	71	10	15	17	17	6	1		1	4	
O 216 CABRINI HM	7		1	2	3	1					
O 217 HICKER PRK	215	108	51	39	7	3	3		1	3	
O 218 SOUTHERN	148	17	21	46	53	7	3		1		
O 220 IDA B WELL	3			3							
O 221 HEN HORNER	5		2	1	2						
O 222 ROCKWELL G	4			1	1	2					

JCB #1160C-041

ILLINOIS DEPARTMENT OF PUBLIC AID

FORMAT 2. MONTHLY REPORT OF DISPOSED APPLICATIONS AT END OF MONTH BY DATE OF APPLICATION

MAY 1971

AABD BLIND MAG

COUNTY OR DISTRICT OFFICE	NUMBER OF APPLICATIONS DISPOSED OF DURING MONTH	LENGTH OF TIME APPLICATION WAS PENDING: WITHIN 2 DAYS	3-10 DAYS	11-30 DAYS	31-60 DAYS	61-90 DAYS	91-120 DAYS	121-150 DAYS	151-180 DAYS	6-9 MNTHS	9-MNTHS OR OVER
3 091 SANGAMON	1			1							
REGION TOTALS	1			1							
4 066 MARION	1			1							
REGION TOTALS	1			1							
5 052 JOHNSON	1			1							
REGION TOTALS	1			1							
6 030 DUPAGE	1				1						
6 053 KANE	1			1							
6 106 WHITESIDE	2		1		1						
6 109 WINNEBAGO	1			1							
REGION TOTALS	5		1	2	2						
DOWNSTATE TOTALS	17		3	7	3	1	2	1			
STATE TOTALS	35	5	7	11	5	2	2	1	1	1	

AABD DISABLED MAG

COUNTY OR DISTRICT OFFICE	NUMBER OF APPLICATIONS DISPOSED OF DURING MONTH	LENGTH OF TIME APPLICATION WAS PENDING									
		WITHIN 2 DAYS	3-10 DAYS	11-30 DAYS	31-60 DAYS	61-90 DAYS	91-120 DAYS	121-150 DAYS	151-180 DAYS	6-9 MNTHS	9-MNTHS OR OVER
0 223 JANE ADDAM	10	1			5		2			1	1
0 224 H ICKES HM	9	1		3	5					1	
0 225 STATELAY G	7	1	2	3	1						
0 226 S SUBURBAN	109	7	8	31	32	24	3	2	1	1	
0 227 HOSP AP SV	55		7	18	19	4	3			2	2
0 228 LOW. NORTH	153	4	49	67	6	1	1	1	1	5	18
0 229 W SUBURBAN	66	1	8	24	24	8			1		
REGION TOTALS	2701	617	617	690	443	144	50	18	17	47	58
COOK TOTALS	2701	617	617	690	443	144	50	18	17	47	58
1 015 BUREAU	3		3								
1 037 FULTON	5		3		1				1		
1 044 HENDERSON	2				2						
1 045 HENRY	3				2			1			
1 056 KNOX	3				2				1		
1 067 MARSHALL	2	1			1						
1 070 MCDONOUGH	2				2						
1 074 MERCER	1					1					
1 090 PEORIA	37	7	6	6	7	3	6	1		1	
1 089 ROCK ISLAN	26	2	1	5	12	5	1				
1 098 TAZEWELL	7	5			1					1	

AABD DISABLED MAG

COUNTY OR DISTRICT OFFICE	NUMBER OF APPLICATIONS DISPOSED OF DURING MONTH	LENGTH OF TIME APPLICATION WAS PENDING									
		WITHIN 2 DAYS	3-10 DAYS	11-30 DAYS	31-60 DAYS	61-90 DAYS	91-120 DAYS	121-150 DAYS	151-180 DAYS	6-9 MNTHS	9-MNTHS OR OVER
1 102 WARREN	1				1		1				
1 110 WOODFORD	1					1					
REGION TOTALS	93	15	13	11	31	10	7	2	2	2	
2 019 CHAMPAIGN	30	5	5	5	12	1	1	1			
2 021 CLARK	1						1				
2 024 COLES	4			3				1			
2 028 DE WITT	2		1	1							
2 031 EDGAR	5	1		1	3						
2 033 EFFINGHAM	3			2		1					
2 035 FORD	1			1							
2 046 IROQUOIS	4	1	2		1						
2 054 KANKAKEE	67	3	2	4	13	15	10	6	6	6	2
2 061 LIVINGSTON	7		3	2		2					
2 063 MACON	20	1	1	1	3	7	5	1		1	
2 072 MCLEAN	8	1			3	3	1				
2 078 MOULTRIE	1	1									
2 094 SHELBY	2	1	1								
2 100 VERMILION	18	2	1	6	1		1	1	2	3	1
REGION TOTALS	173	16	16	26	36	29	19	10	8	10	3
3 010 ADA	20			1	4	3	1	4	2	1	

AABD DISABLED MAG

COUNTY OR DISTRICT OFFICE	NUMBER OF APPLICATIONS DISPOSED OF DURING MONTH	LENGTH OF TIME APPLICATION WAS PENDING									
		WITHIN 2 DAYS	3-10 DAYS	11-30 DAYS	31-60 DAYS	61-90 DAYS	91-120 DAYS	121-150 DAYS	151-180 DAYS	6-9 MNTHS	9-MNTHS OR OVER
3 018 CASS	1		1								
3 020 CHRISTIAN	4		1		1	2					
3 039 GREENE	4		3			1					
3 042 HANCOCK	1				1						
3 050 JERSEY	4		1	1	1	1					
3 062 LOGAN	5			2	2	1					
3 064 MACOUPIN	3				3						
3 068 MASON	2				2						
3 073 MENARD	4			2	2						
3 076 MONTGOMERY	3				2	1					
3 077 MORGAN	22	1	6	4	6	1	1	1	2		
3 083 PIKE	2			1			1				
3 091 SANGAMON	30	2	1	5	11	8		1		2	
3 092 SCHUYLER	2	1	1								
REGION TOTALS	107	4	16	16	35	18	5	6	4	3	
4 012 BOND	1	1									
4 022 CLAY	3			1	2						
4 023 CLINTON	7			1	2	4					
4 025 CRAWFORD	3			2				1			
4 032 EDWARDS	1				1						

COUNTY OR DISTRICT OFFICE	NUMBER OF APPLICATIONS DISPOSED OF DURING MONTH	LENGTH OF TIME APPLICATION WAS PENDING: WITHIN 2 DAYS	3-10 DAYS	11-30 DAYS	31-60 DAYS	61-90 DAYS	91-120 DAYS	121-150 DAYS	151-180 DAYS	6-9 MNTHS	9-MNTHS OR OVER
4 034 FAYETTE	2	1			1						
4 048 JASPER	1	1									
4 054 JEFFERSON	7	4	3								
4 056 LAWRENCE	6			2	3	1					
4 065 MADISON	75	6	5	5	20	15	8	10	2	3	1
4 066 MARION	3	1			2						
4 075 MONROE	6		1	3	2						
4 088 RICHLAND	2	1			1						
4 096 ST CLAIR	75	36	15	18	6						
4 101 WABASH	2			1	1						
4 104 WAYNE	6	1	1	1	2	1					1
REGION TOTALS	200	52	25	34	43	21	8	11	2	3	1
5 011 ALEXANDER	4	2		2							
5 036 FRANKLIN	22	4	2	3	6	5		2			
5 038 GALLATIN	1					1					
5 041 HAMILTON	1				1						
5 043 HARDIN	2		1				1				
5 047 JACKSON	10		1	1	2	3	1	1	1		
5 069 MASSAC	6	2		1	1	1	1				
[illegible]	9				1	1					

MAY 1971

AABD DISABLED MAG

COUNTY OR DISTRICT OFFICE	NUMBER OF APPLICATIONS DISPOSED OF DURING MONTH	LENGTH OF TIME APPLICATION WAS PENDING									
		WITHIN 2 DAYS	3-10 DAYS	11-30 DAYS	31-60 DAYS	61-90 DAYS	91-120 DAYS	121-150 DAYS	151-180 DAYS	6-9 MNTHS	9-MNTHS OR OVER
5 085 PULASKI	4	1		3							
5 087 RANDOLPH	2		1	1							
5 090 SALINE	10		1	1	2	4	1	1			
5 099 UNION	7			5	1		1				
5 105 WHITE	6		1	2	1	2					
5 108 WILLIAMSON	7		3	3		1					
REGION TOTALS	84	9	10	22	15	18	5	4	1		
6 013 BOONE	4			2	2						
6 017 CARROLL	1			1							
6 027 DEKALB	2		1		1						
6 030 DUPAGE	23	2		3	5	4	4	3	1	1	
6 040 GRUNDY	2			1	1						
6 051 JO DAVIESS	2				2						
6 053 KANE	57		2	11	23	14	4	2	1		
6 055 KENDALL	1	1									
6 057 LAKE	43	8	1	3	5	6	10	3	1	4	2
6 058 LA SALLE	9			3		4	1			1	
6 060 LEE	11			2	6		1	2			
6 071 MCHENRY	13	2	3	2	2	2	1	1			
6 079 OGLE	4			3						1	

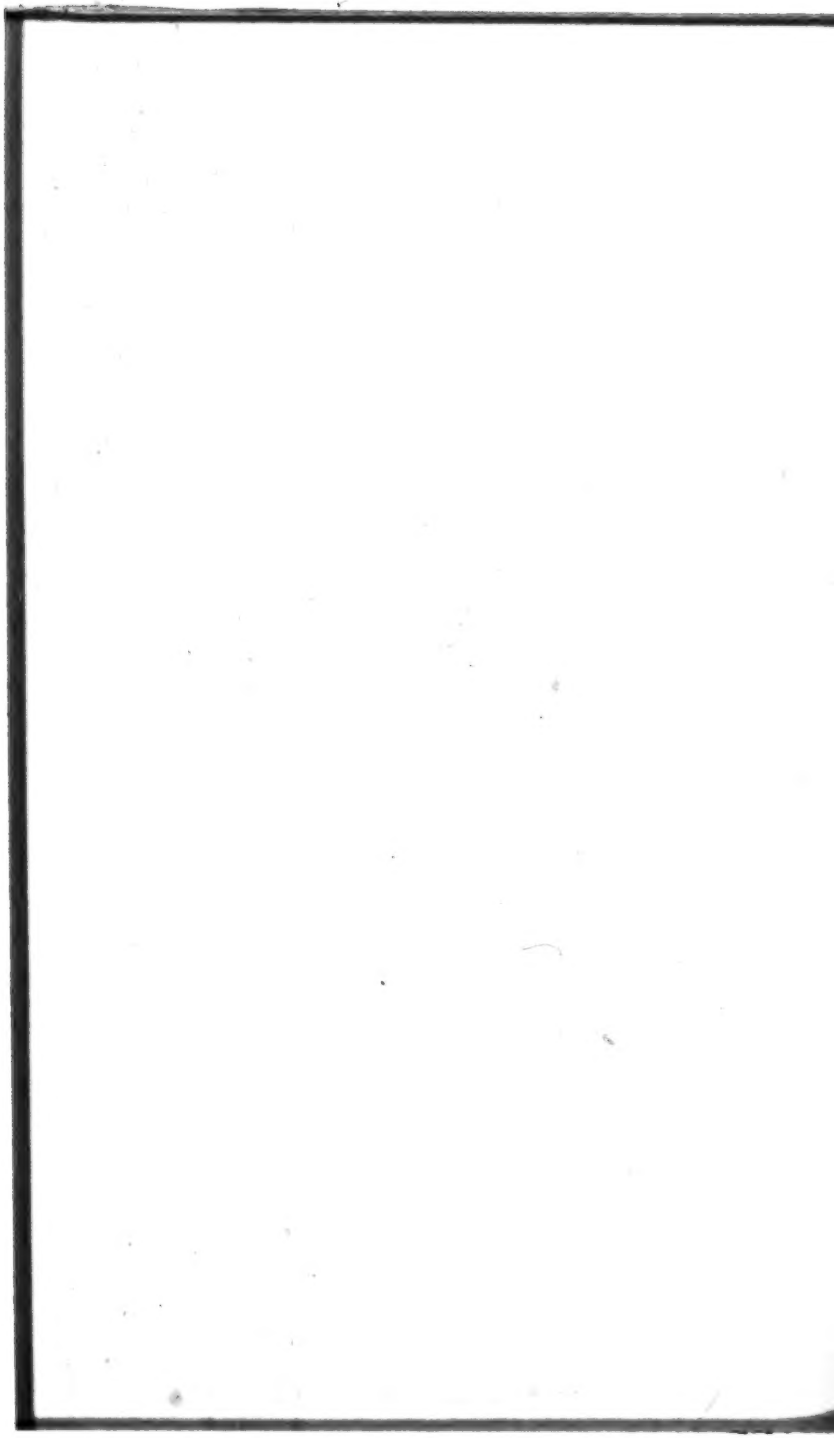
JOB 81600-041 ILLINOIS DEPARTMENT OF PUBLIC AID PAGE

FORMAT 2. MONTHLY REPORT OF DISPOSED APPLICATIONS AT END OF MONTH BY DATE OF APPLICATION

MAY 1971

AABD DISABLED MAG

COUNTY OR DISTRICT OFFICE	NUMBER OF APPLICATIONS DISPOSED OF DURING MONTH	LENGTH OF TIME APPLICATION WAS PENDING									
		WITHIN 2 DAYS	3-10 DAYS	11-30 DAYS	31-60 DAYS	61-90 DAYS	91-120 DAYS	121-150 DAYS	151-180 DAYS	6-9 MNTHS	9-MNTHS OR OVER
6 097 STEPHENSON	10			2	1	3	4				
6 106 WHITESIDE	14	1	4	1	4	3	1				
6 107 WILL	30	1	1	7	6	8	4		1	1	1
6 109 WINNEBAGO	87	9	14	37	16	6	4	1			
REGION TOTALS	313	24	26	78	74	50	34	12	4	8	3
DOWNSTATE TOTALS	970	120	106	187	234	146	78	45	21	26	7
STATE TOTALS	3671	737	723	877	677	290	128	63	38	73	65



INTER-OFFICE MEMORANDUM

Rec 6/24/71

Date June 23, 1971

COUNTY DEPARTMENT OF PUBLIC AID
PUBLIC ASSISTANCE DIVISION

. Charles McDowell, Supervisor — From Judson T. Murray, Assistant Chief

Bland District Office — Address Bureau of Resources and Legal Services

RDAN, John 03-203-125907 Civil Action File No. 71 C 70 U. S. District Court

s will confirm our telephone conversation of June 23, 1971, pertaining to troactive assistance for John Jordan, Disability Assistance recipient and intiff in the Federal Court case.

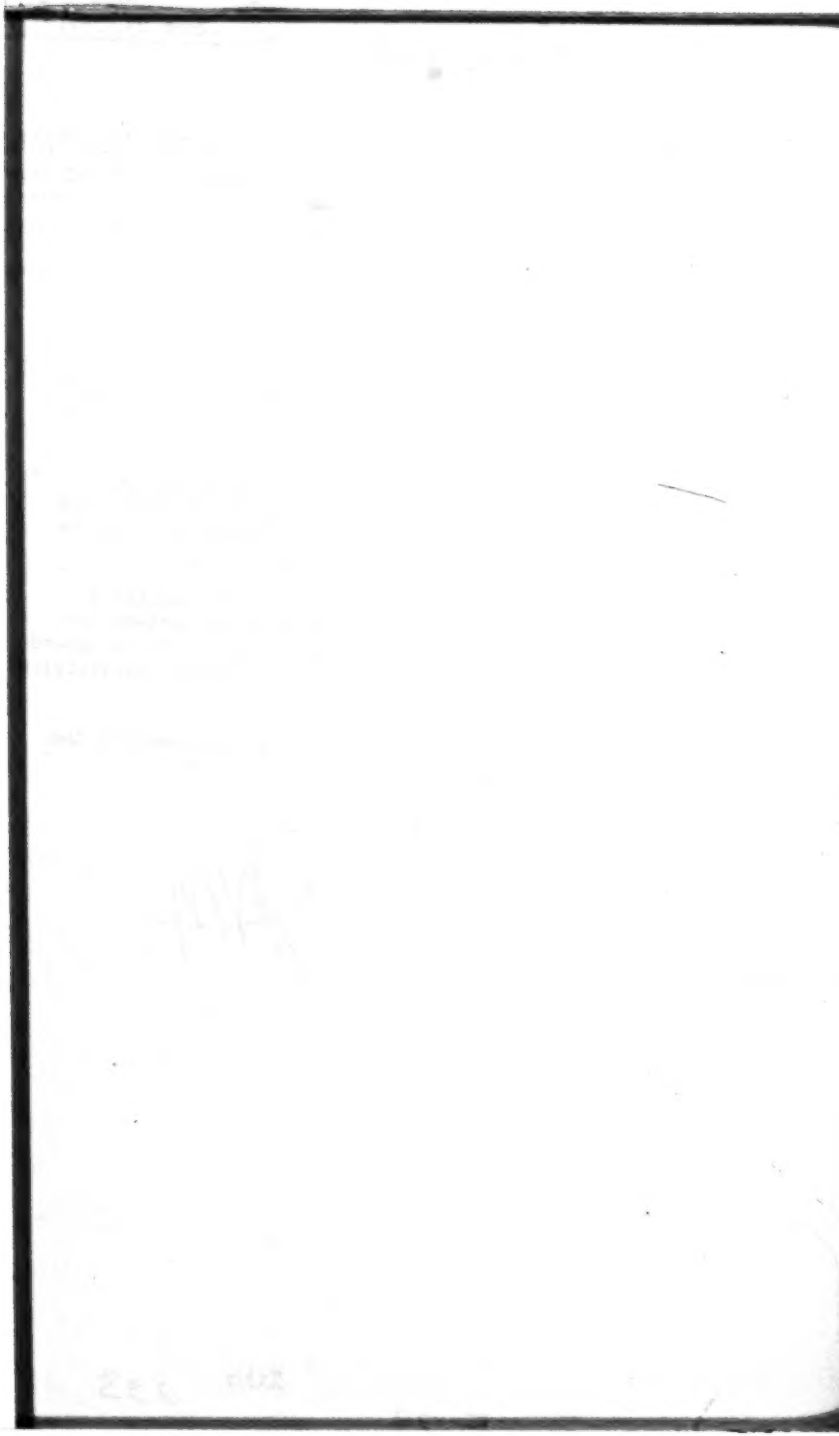
llowing request of the Office of the State's Attorney of Cook County, . O'Malley telephoned Mr. Gershon Hurwitz, Assistant Director, IDPA, and tained approval to issue retroactive assistance to Mr. Jordan in order to oid possible contempt citation on the Director, CCDPA.

u were requested to issue retroactive assistance for the two months im-diately preceding January 1, 1971, the effective date of assistance for . Jordan. Based on the regular February 1971 grant the amount to be issued uld total $195.66. It was agreed that your office would notify the recipient f this action.

e advised that by use of the Mercury Payroll, Mr. Jordan will receive the troactive grant about Wednesday, June 30, 1971.

JTM:v

c: Mrs. O'Malley



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN JORDAN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 71 C 70
	)	
HAROLD O. SWANK, etc., et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' BRIEF IN OPPOSITION
TO MOTION OF PLAINTIFFS FOR SUMMARY
JUDGMENT, PERMANENT INJUNCTION,
AND OTHER RELIEF

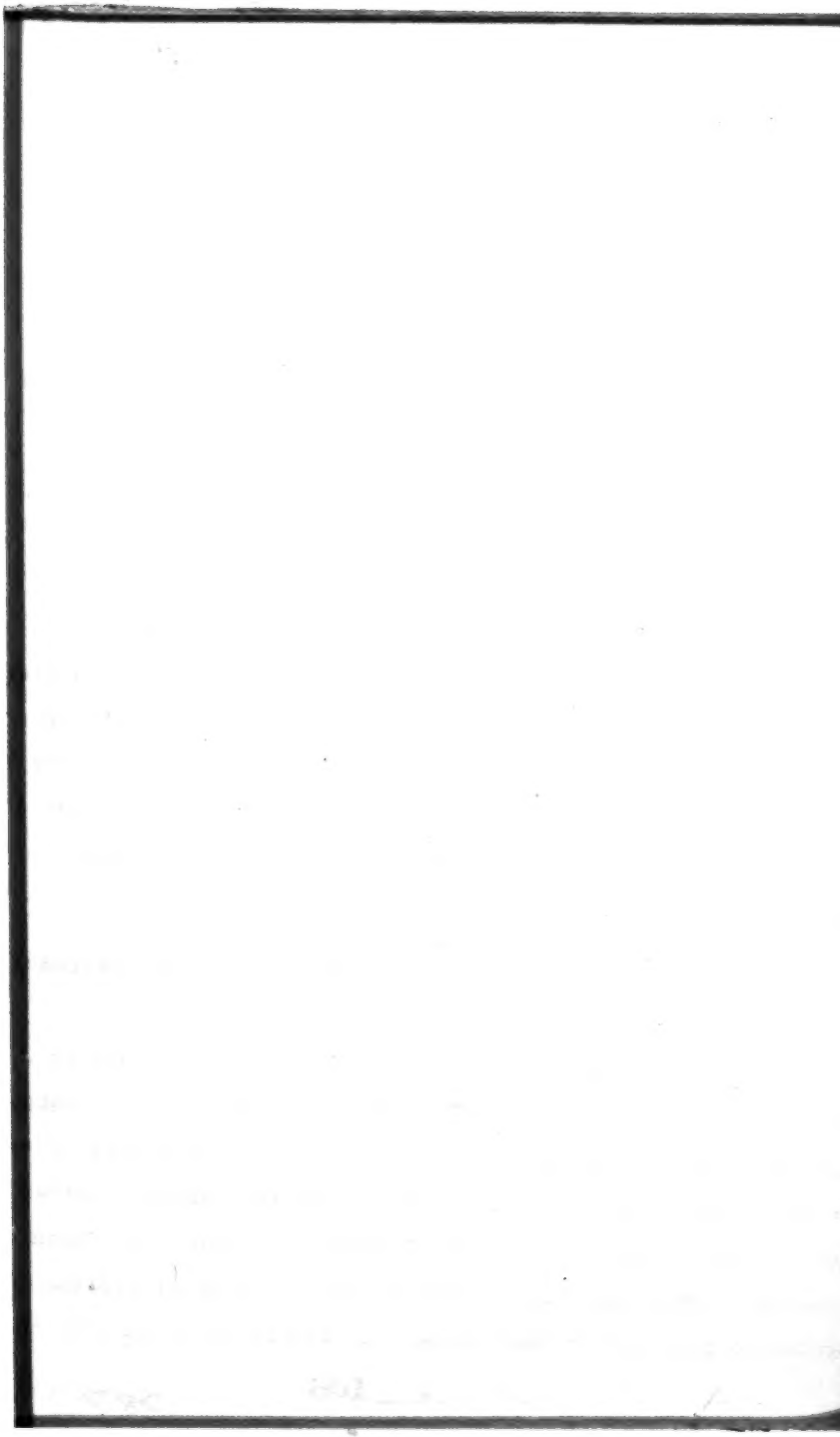
I. PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW ON COUNT I.

A. Plaintiffs are Not Entitled to a Permanent Injunction

As is stated in Plaintiffs' brief, a preliminary injunction has previously been issued in this cause and the Defendants are making every effort to comply with said injunction. The entry of a permanent injunction would merely make this preliminary order a final order and the Defendants are not intentionally trying to disregard this Court's orders.

B. Plaintiffs are Not Entitled to all AABD Assistance Retroactive to July 1, 1968.

The principal case relied on by Plaintiffs here is RODRIGUEZ V. SWANK, 403 U.S. 901 (1971), affirming 318 F. Supp. 289 (N.D. Ill. 1970). In that case retroactive payments were ordered, but only back to the date of the filing of that lawsuit rather than back to July 1, 1968. The federal regulation which was found to be violated in that case took effect on July 1, 1968 as did the federal regulation involved in this cause. It should be noted that the



United State Supreme Court in Rodriguez felt that the granting of retroactive benefits to the date of the filing of the lawsuit was a sufficient deterent to the Defendants and that compelling such retroactive payments back to July 1, 1968 was unnecessary.

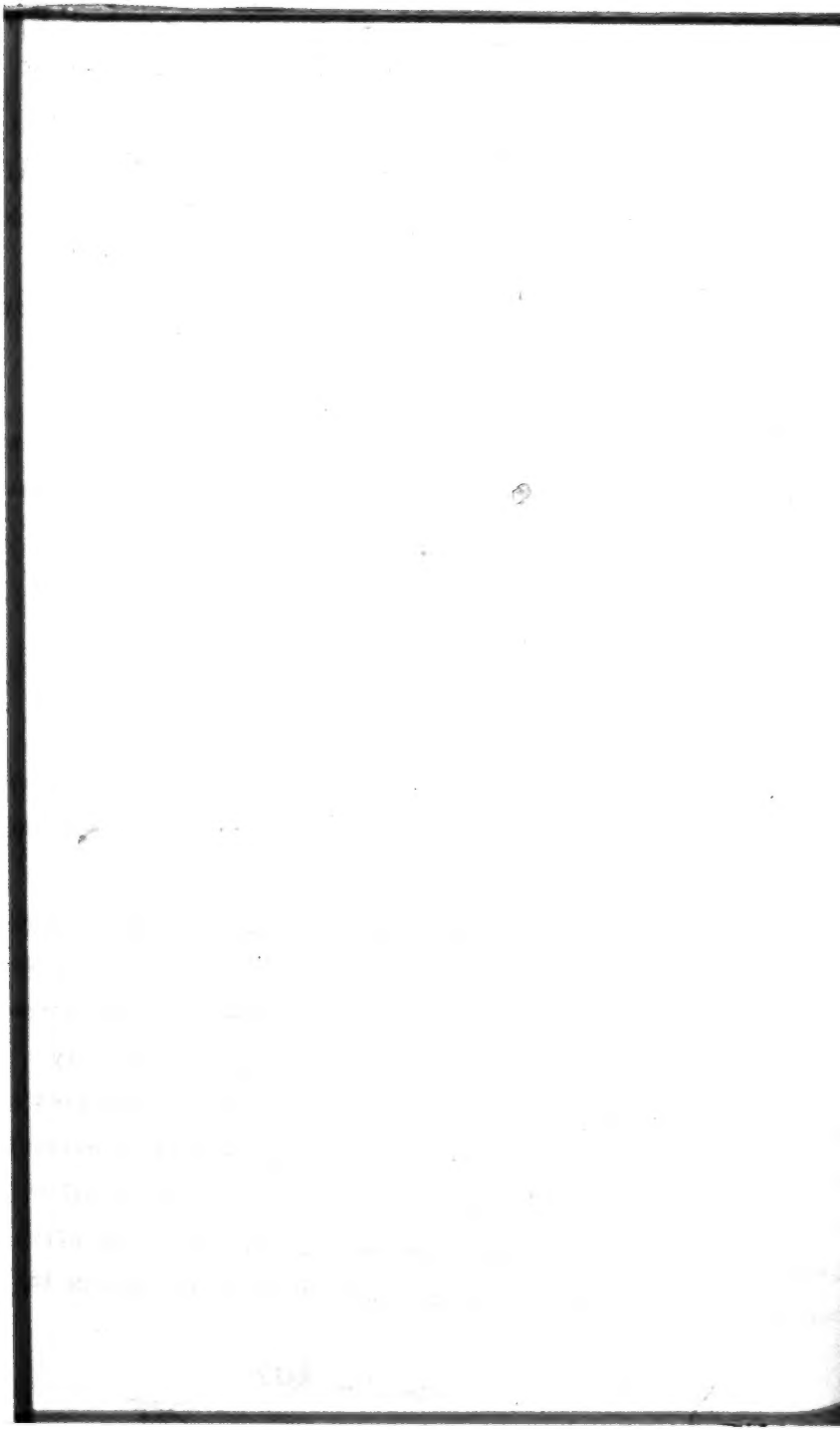
Likewise in the case at hand, any order of retroactivity of payments should not compel the payment of such benefits back any farther than the date this lawsuit was filed.

The Defendants do state that retroactivity of benefits in this case is totally unnecessary without a showing on the part of the Plaintiffs that they have actually suffered a loss as a result of not obtaining benefits on or before the thirtieth or sixtieth day.

C. This Court Should Not Impose Any Punitive Damages Against Harold O. Swank.

All of the cases relied upon by the Plaintiffs are clearly distinguishable from the case at hand, and they will be considered in the order in which Plaintiffs cited them.

First, the case of Adickes v. S. H. Kress and Company, 90 S. Ct. 1598, 398 U.S. 144 (1970) involved an action by a white woman who had been denied service in the defendant's restaurant because she was in the company of Negroes. A New York City policeman was involved in the action because he had arrested the plaintiff while she was attempting to obtain a meal in defendant's restaurant. This case was remanded for a new trial to allow the plaintiff to prove her case. However, in that case the plaintiff had to show direct action on the part of the State and in the case



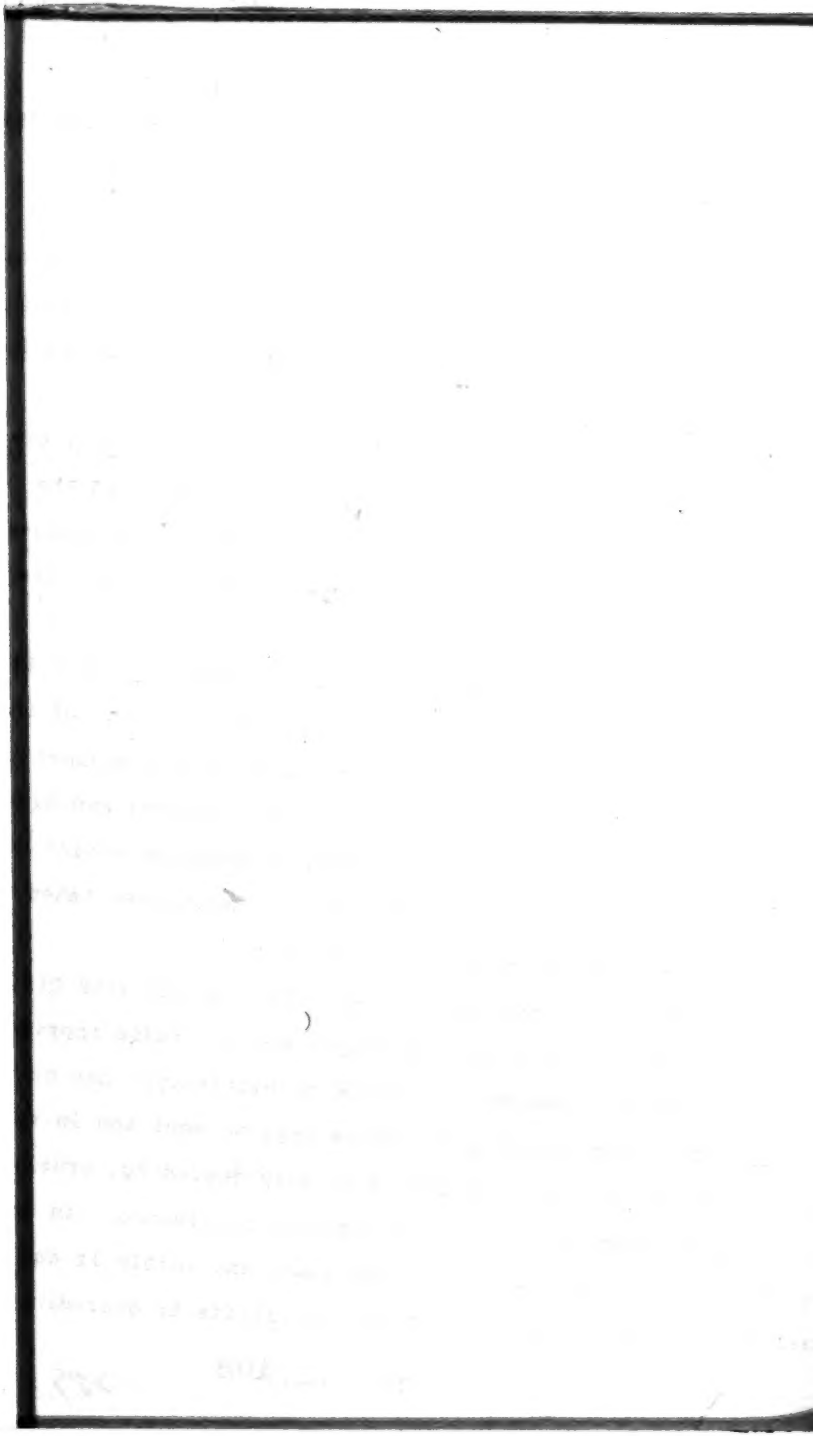
at bar there is no direct action on the part of Mr. Swank.

Second, is the case of Caperci v. Hantoon, 397 F.2d 799 (1st Cir., 1968). This case also involved actions of police officers, where they conducted an illegal search of plaintiff's home without either probable cause or a search warrant. Here too, direct action of these police officers is involved in depriving plaintiff of his rights; while in the case at hand, Defendant Swank did no positive acts.

Third, in Lee v. Southern Home Sites Corporation, 429 F.2d 290 (5th Cir., 1970) the court denied punitive damages to the plaintiff who was not allowed to purchase a home solely because of his race. That case involves no state official and is clearly inapplicable to the case at hand.

Fourth, is the case of Mansell v. Saunders, 372 F.2d 573 (5th Cir., 1967). The Court held that the complaint of the owner of a garbage business stated a cause of action against county commissioners for violation of his due process and equal protection rights. This case also involved positive action on the part of the defendants and no such positive action was taken by Mr. Swank in the cause now before this court.

Next, in Anderson v. Nosser, 438 F.2d 183 (5th Cir., 1971) the court held that damages were proper for the false imprisonment of demonstrators. However, the State of Mississippi has no law granting officials immunity for false imprisonment and in that case the plaintiffs were also subjected to very degrading, cruel, and unusual punishment while being wrongfully imprisoned. In the case at bar, no such positive action was taken and surely it cannot be said that Mr. Swank subjected these plaintiffs to degrading, cruel



or unusual pulishment.

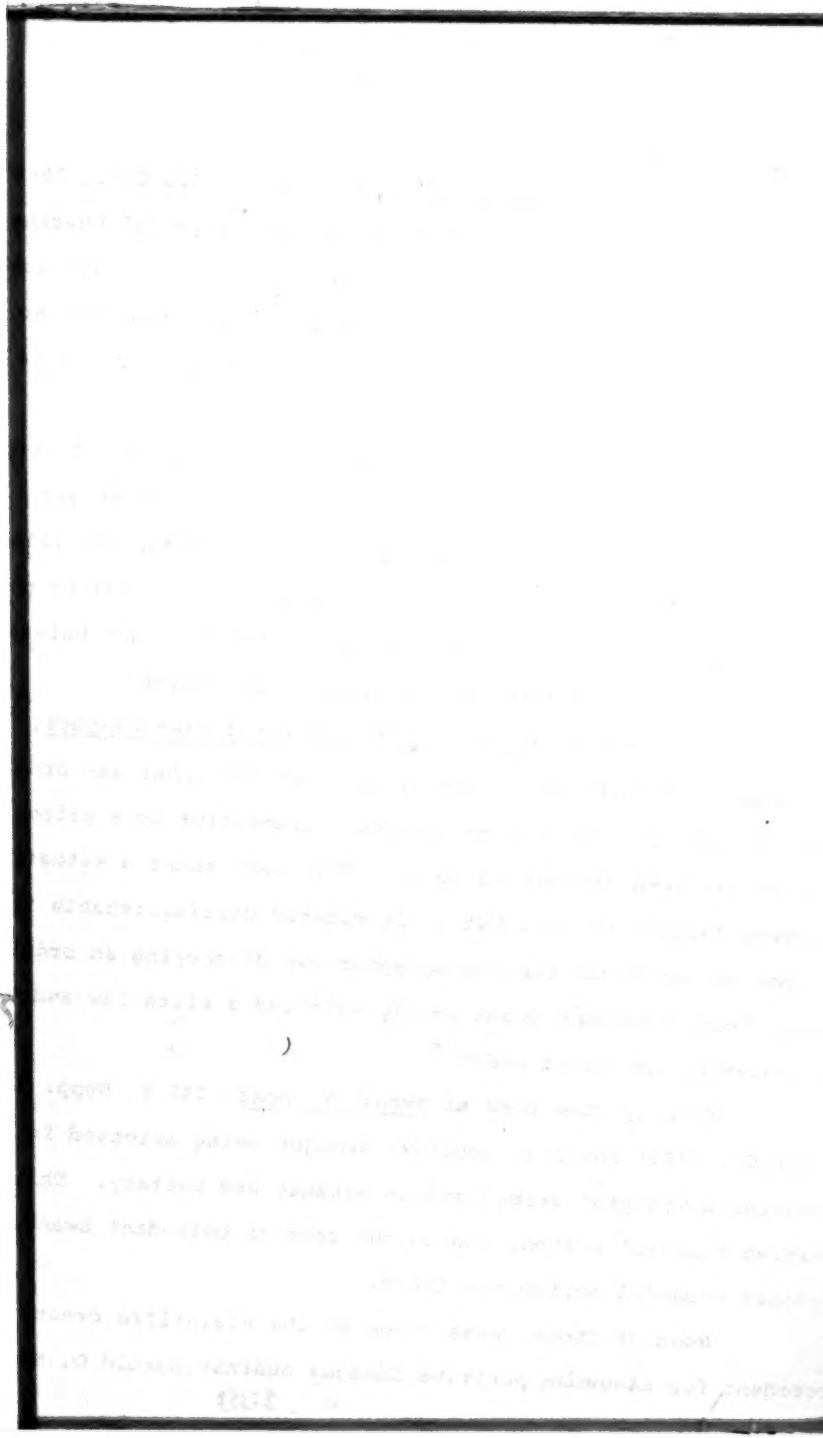
Fifth, in Basista v. Weir, 340 F.2d 74 (3rd Cir., 1965), the plaintiff was subjected to wrongful arrest, physical beating, and humiliation before his neighbors, and this took positive action on the part of the police officer. Defendant Swank has done no positive acts and also has done nothing so patently wrongful as was the case in Basista.

In addition, the Court in Rhoads v. Horvat, 270 F. Supp. 307 (D.C. Col., 1967) held that $5,000.00 in compensatory and $2,500.00 in exemplary damages was a liberal award for the illegal arrest and detention of the plaintiff. Again, this involves positive action on the part of the defendants and in the case now before this court there was no positive action taken by Mr. Swank.

Also, in Washington v. Official Court Stenographer, 251 F.Supp. 945 (D.C. Pa., 1966) a court stenographer was ordered to pay damages for failure to provide a transcript to a prisoner after he had been ordered to do so. This case shows a situation involving failure to act, but it is clearly distinguishable from the case at bar since the stenographer was disobeying an order of court. Here Defendant Swank merely enforced a state law and was not violating any court order.

Finally, the case of Brooks v. Moss, 242 F. Supp. 531 (W.D.S.C., 1965) involved punitive damages being assessed in a case involving a wrongful arrest and an assault and battery. This was positive wrongful action; and in the case of Defendant Swank, no positive wrongful action was taken.

None of these cases cited by the Plaintiffs create any precedent for assessing punitive damages against Harold O. Swank.



All of these cases concern affirmative action or inaction rather than a lack of diligence of a person in a top executive position. None of those defendants had jobs of a such a high position as Mr. Swank and they all involved close personal action between the plaintiffs and the defendants.

Therefore, this is not a proper case for the assessment of punitive damages, and to do so would be neither reasonable nor justifiable.

II. PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON COUNT II

A. Nothing in the Illinois Public Aid Code Requires That AABD Assistance Be Granted From the Date of Application.

Plaintiffs cite no State or Federal law or regulation which requires that assistance be granted from the date of application. Instead they simply state that since no provisions in the law authorize the present position of the Department it must be the wrong position.

This is a novel position, and totally incorrect, because the reasoning is that the only things that can be done are those which are specifically spelled out. Yet, the Plaintiffs state that the Defendants must grant assistance from the date of application even though no specific provision requires it.

Plaintiffs cite People ex. rel. Naughton v. Illinois Department of Public Aid, No. 70 L 11380 (Circuit Court of Cook County, 1971) as precedent for their position here. As is clear from Plaintiffs' Brief, this was a trial court decision and is therefore without any precedent value whatsoever.

Then it is stated by Plaintiffs that since this case was never appealed, it should be taken as state court precedent. This too is clearly a position without basis or justification.

Plaintiffs next cite five cases they feel control this case. These cases are all distinguishable, and will be treated separately.

First, Ewing v. Gardner, 185 F.2d 781 (6th Cir. 1950) involved Social Security benefits, not public assistance, and therefore has no value in this cause.

Second, Anderson v. United States, 205 F.2d326 (9th Cir. 1953) involved annuities, and therefore clearly has no application to public assistance grants.

Next, Conant v. State, 197 Wash. 21, 84 P.2d 378 (1938) involved old age assistance, but closer inspection of that case reveals that the Washington state statute specifically provided that assistance be granted from the date of application.

In addition, the case of Finley v. Marion County, 81 Ore. 294, 159 P. 557 (1916) involved pension benefits rather than public assistance.

Finally, In Re Wolfe, 81 Ore, 297, 159 P. 558 (1916) also did not involve public assistance.

Therefore, none of these cases have any application to the case at hand, and the Plaintiffs arguments are without basis.

B. Defendants' Actions Do Not Violate the Federal Requirements For Equitable and Objective Treatment of AABD Applicants.

While it is true that some applications are processed more quickly than others, many factors can cause this result. One

is that some caseworkers are busier than others, but others are that some applications take longer to process than others because of the factors that must be determined to exist in order to determine eligibility.

C. There Is No Violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

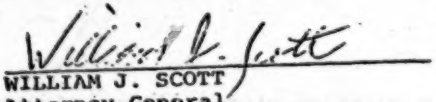
In order to prove a violation of the equal protection clause, it must be shown that an unreasonable and arbitrary classification exists which was caused by the affirmative action of the defendants.

Here there have been no classifications of any kind set up by actions of the Defendants. Rather a situation has arisen, completely outside the effective control of the Defendants, and this is not sufficient to prove violation of the equal protection clause.

In addition, the relief Plaintiffs have received by the preliminary injunction already issued by this court is sufficient to alleviate the problems complained of here.

CONCLUSION

Therefore, Defendants respectfully submit that the Plaintiffs' motion for summary judgment, permanent injunction, and other relief should be denied.



WILLIAM J. SCOTT
Attorney General
State of Illinois
Attorney for Defendants,
Illinois Dept. of Public Aid,
Harold O. Swank, and
Edward T. Weaver, Successor Director
160 North La Salle Street
Chicago, Illinois 60601

EDWARD FISHER
ssistant Attorney General
(Of Counsel)
93-3656

STATE OF ILLINOIS)
) SS
COUNTY OF C O O K)

THE UNDERSIGNED, being first duly sworn on oath, deposes and says that a copy of the foregoing

DEFENDANTS' BRIEF IN OPPOSITION TO MOTION OF PLAINTIFS FOR SUMMARY JUDGMENT, PERMANENT INJUNCTION, AND OTHER RELIEF

was served upon the following by delivering such copy on December 1, 1971

Sheldon H. Roodman
Community Legal Counsel
116 South Michigan Avenue
Chicago, Illinois 60603

Edward V. Hanrahan
State's Attorney of Cook County
500 Civic Center
Chicago, Illinois
Attention: James Rooney

Martin A. Schwartz

SUBSCRIBED AND SWORN TO
before me this 1st day
of December, 1971, A.D.

Notary Public

Attachment 6 #23

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

#23

JOHN JORDAN, et al.,

Plaintiffs,

vs.

HAROLD O. SWANK, etc., et al.,

Defendants.

No. 71 C 70

NOTICE AND PROOF OF SERVICE

TO: Sheldon H. Roodman
Community Legal Counsel
116 South Michigan Avenue
Chicago, Illinois 60603

William J. Scott
Attorney General of Illinois
160 North LaSalle Street
Chicago, Illinois 60601
ATTN.: C. Edward Fisher

PLEASE TAKE NOTICE that the defendants, DAVID L. DANIEL and the COOK COUNTY DEPARTMENT OF PUBLIC AID do not intend to file a separate brief in opposition to plaintiff's motion for summary judgment and other permanent relief. They adopt in toto the brief filed December 1, 1971, by the Attorney General of Illinois as their brief.

EDWARD V. HANRAHAN
State's Attorney of Cook County

By: _____
James A. Rooney
Assistant State's Attorney

JAMES A. ROONEY, hereby certifies that he served copies of this notice and proof of service by mailing said copies on December 6, 1971 to the parties to whom it is directed.

James A. Rooney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN JORDAN, by his next friend, JEANETTE BRYANT, individually and on behalf of all other persons similarly situated, Plaintiffs,	)	
vs.	)	NO. 71 C 70
HAROLD O. SWANK, Director, Illinois Department of Public Aid; DAVID DANIEL, Director, Cook County Department of Public Aid; EDWARD J. BARRETT, Comptroller of Cook County, individually and in their official capacities, Defendants.	)	

MEMORANDUM OPINION AND ORDER

This civil rights action challenges the administration of federally funded Aid to the Aged, Blind and Disabled program (AABD) by the defendants. Currently, the plaintiff has moved for summary judgment seeking a permanent injunction, declaratory judgment, and punitive damages. Plaintiff argues and the court agrees that there exists no genuine issue of material fact.

Section 1382(a)(8) of Title 42 provides that assistance under the AABD plan shall be made to eligible applicants with reasonable promptness. Federal regulations stipulate that reasonable promptness shall not exceed 30 days for aid to the aged and blind and 60 days for the disabled. These time limitations are mandatory.

driquez v. Swank, 318 F. Supp. 289 (N.D. Ill. 1970) (Kiley, Will d Decker, JJ). The defendants, as administrators of the Illinois rogram, have not complied with these limits, either for determining ligibility or in furnishing the first assistance check. Federal andbook of Public Assistance Administration, Part IV, §§2200(b)(3)(4) nd 2300(b)(3)(5). For the reasons stated by plaintiff in his memoran- m, the court agrees that the plaintiff class is entitled as a matter f law to a permanent injunction to insure compliance, present and uture, with the requisite time limitations.

Based on the same authority a final judgment will be entered eclaring the Illinois Categorical Assistance Manual sections 4004 nd 8255 (and subsections thereunder) as applied to applicants for AABD to be invalid insofar as they are inconsistent with the Social Security Act and regulations issued pursuant thereto.

Plaintiff also seeks punitive damages against defendant Swank, who was the Director of the Illinois program. The court is not inclined to grant such damages, believing the permanent injunction to be a sufficient deterrent to future violations.

Finally, a final judgment and permanent injunction is sought requiring defendants to pay to those applicants for AABD since July 1, 1968, who met the eligibility requirements for AABD at the time

of their applications, AABD benefits from the date of their application. Based on the Rodriquez case and other authority cited by plaintiff, the class is entitled to such payments at least from the last day of the requisite time limitations contained within the federal regulatio The class consists of those applicants who applied for AABD since the effective date of the regulations, July 1, 1968, and did not receive their initial check as required within the 30 day or 45 day (60 days for aid to the disabled as of January 1, 1971) limits. Lewis v. Riggins, _____F. Supp._____ (Cause No. 71 H 19, N. D. Ind. May 19, 1971).

Plaintiff, however, seeks the retroactive payments from the date of application rather than the last day of the time limitati The court cannot agree with this position. The federal statute and regulations grant a reasonable time to the administrators to act upon the application and require payments to begin only within that period but not from the beginning of such period. This court perceiv no requirement that the assistance shall be paid retroactively to the date of application. Nor is the right to the equal protection of the law violated by such an order. The processing of some applications faster than others within the time limits does not establish arbitra classifications constituting invidious discrimination. No classifi- cations will be processed before others. As long as all are complet

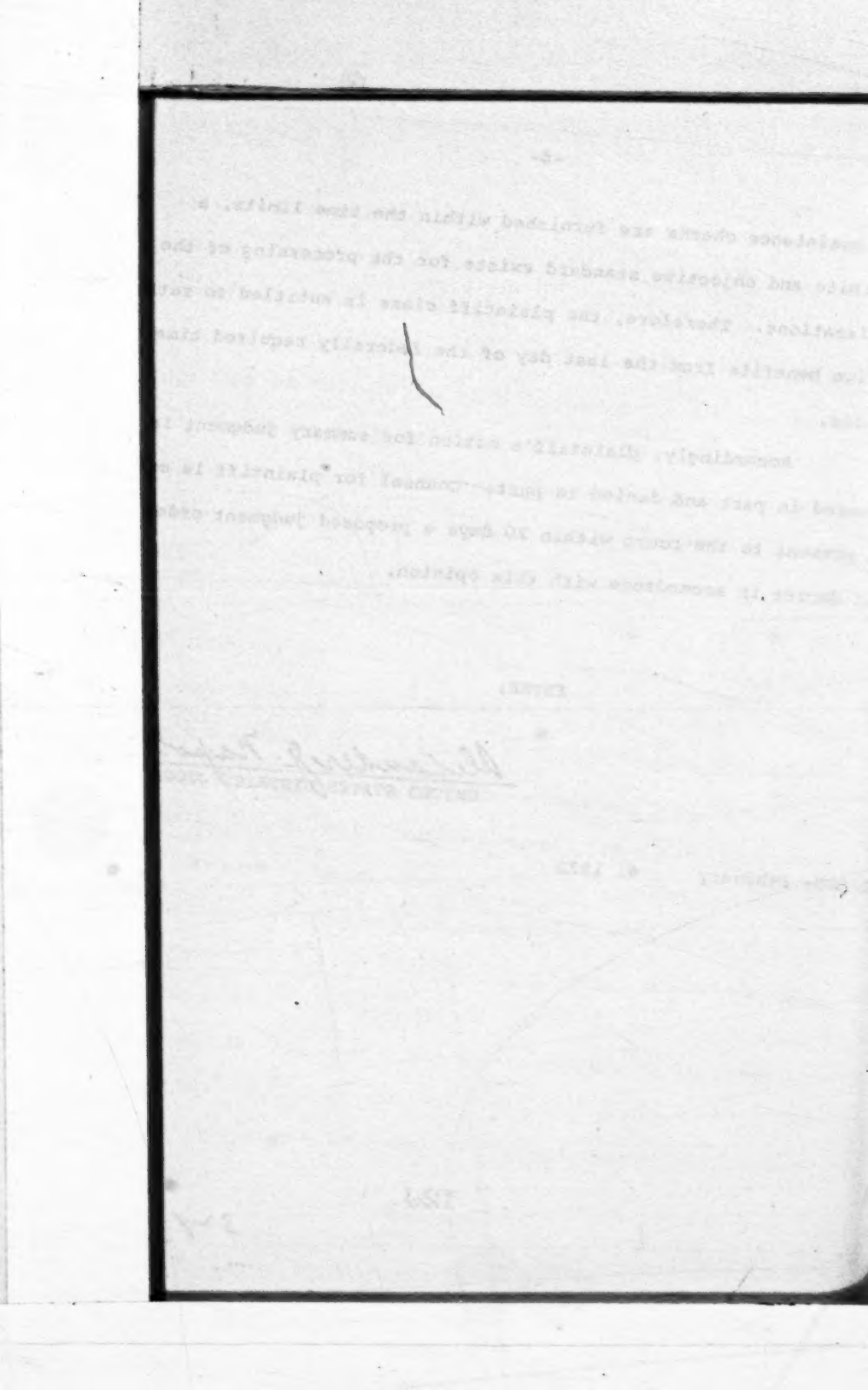
and assistance checks are furnished within the time limits, a definite and objective standard exists for the processing of the applications. Therefore, the plaintiff class is entitled to retroactive benefits from the last day of the federally required time limits.

Accordingly, plaintiff's motion for summary judgment is granted in part and denied in part. Counsel for plaintiff is ordered to present to the court within 20 days a proposed judgment order and decree in accordance with this opinion.

ENTER:

Alexander J. Napoli
UNITED STATES DISTRICT JUDGE

DATED: February 4, 1972



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN JORDAN, et al.,)
)
Plaintiffs,)
)
vs.) No. 71 C 70
)
EDWARD T. WEAVER, et al.,)
)
Defendants.)

NOTICE OF FILING

To: William J. Scott
Attorney General
160 N. LaSalle St.
Chicago, Ill.60601
Attn: Richard Byrne

Edward V. Hanrahan
State's Attorney
500 Civic Center
Chicago, Ill.60602
Attn: James Rooney

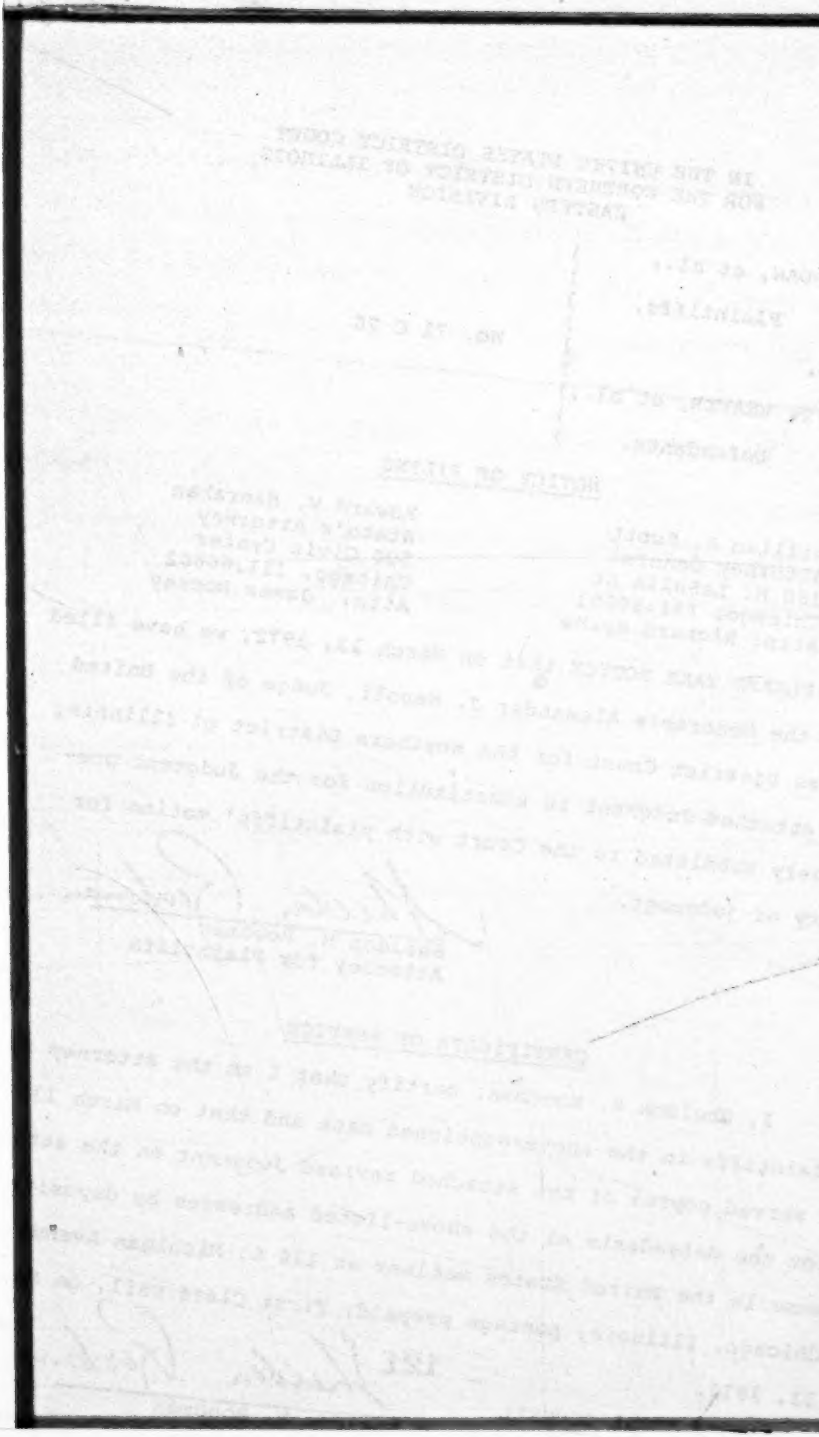
PLEASE TAKE NOTICE that on March 13, 1972, we have filed with the Honorable Alexander J. Napoli, Judge of the United States District Court for the Northern District of Illinois, the attached Judgment in substitution for the Judgment previously submitted to the Court with plaintiffs' motion for entry of judgment.

Sheldon Roodman
Sheldon H. Roodman
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, Sheldon H. Roodman, certify that I am the attorney for plaintiffs in the above-captioned case and that on March 13, 1972, I served copies of the attached revised Judgment on the attorneys for the defendants at the above-listed addresses by depositing same in the United States mailbox at 116 S. Michigan Avenue, Chicago, Illinois, postage prepaid, First Class mail, on March 13, 1972.

121 Sheldon Roodman



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN JORDAN, by his next friend, JEANETTE BRYANT, individually and on behalf of all other persons similarly situated,	)	
Plaintiffs,	)	
vs.	)	No. 71 C 70
EDWARD T. WEAVER, Director, Illinois Department of Public Aid; HAROLD O. SWANK, former Director, Illinois Department of Public Aid; DAVID L. DANIEL, Director, Cook County Department of Public Aid; EDWARD J. BARRETT, Comptroller of Cook County, individually and in their official capacities,	)	
Defendants.	)	

JUDGMENT

This action came on for hearing before the Court, Honorable Alexander J. Napoli, United States District Court, and the issues having been duly heard and a Memorandum Opinion and Order having been duly rendered on February 4, 1972,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED:

1. The defendants DAVID L. DANIEL, Director, Cook County Department of Public Aid, and EDWARD J. BARRETT, Comptroller of Cook County, and EDWARD T. WEAVER, Director, Illinois Department of Public Aid, their agents, including

all of the County Departments of Public Aid in the State of Illinois, their employees, and all persons in active concert and participation with them, are hereby permanently enjoined from failing to make determinations of eligibility and mailing either the first full AABD assistance check or notification of denial of assistance, within thirty days from the date of application as to applicants for aid to the aged and blind under the AABD program in the State of Illinois, and within sixty days from the date of application as to applicants for aid to the disabled under the AABD program in the State of Illinois, except as provided in paragraph 3, infra.

2. The entitlement of all eligible AABD applicants in the State of Illinois shall attach no later than the thirtieth (30th) day from the date of application as to aged and blind applicants, and no later than the sixtieth (60th) day from the date of application as to disabled applicants. In any case in which eligibility is determined subsequent to the thirtieth day or sixtieth day, respectively, the applicant shall be entitled to AABD assistance retroactive at the very least to the thirtieth (30th) day or sixtieth (60th) day, respectively, subject only to the exception in paragraph 3, infra. If the applicant is denied AABD assistance retroactive to the thirtieth (30th) or sixtieth (60th) day, respectively, pursuant to paragraph

3, infra, said applicant must receive a written statement explaining (a) the unusual circumstances, referred to in paragraph 3, upon which the denial is based, and (b) that the applicant has the right to appeal within sixty (60) days this decision of the County Department of Public Aid.

3. The thirty-day requirement as defined in paragraphs 1 and 2 and in 45 C.F.R. §206.10(a) (36 Fed.Reg. 3864, February 29, 1972) shall be strictly complied with except in unusual circumstances, e.g., where the agency cannot reach a decision because of failure or delay on the part of the applicant or an examining physician, or because of some administrative or other emergency that could not be controlled by the agency, in which instances the case record shows the cause for the delay.

4. Illinois Categorical Assistance Manual, Section 4004, and subsections thereunder, as applied to applicants for AABD are invalid insofar as they are inconsistent with the requirements of paragraphs 1 and 2, supra.

5. That the defendant EDWARD T. WEAVER, Director, Illinois Department of Public Aid, his agents, including all of the County Departments of Public Aid in the State of Illinois, and employees, and all persons in active concert and participation with them, are hereby enjoined to release and remit AABD benefits wrongfully withheld to all applicants for AABD in the State of Illinois who

applied between July 1, 1968 and April 16, 1972, and were determined eligible, as follows:

(a) For those aged and blind applicants whose first full AABD check was not mailed within thirty days from the date of application, AABD assistance for the period beginning with the thirtieth day from the date of application to the date the applicant's entitlement to AABD became effective;

(b)(i) For those disabled applicants who applied between July 1, 1968 and December 31, 1970, whose first full AABD check was not mailed within forty-five days from the date of application, AABD assistance for the period beginning with the forty-fifth day from the date of application to the date the applicant's entitlement became effective;

(ii) For those disabled applicants who applied between January 1, 1971 and April 16, 1971, whose first full AABD check was not mailed within sixty days from the date of application, AABD assistance for the period beginning with the sixtieth day from the date of application to the date the applicant's entitlement became effective.

These AABD benefits shall be mailed to those persons currently receiving AABD within eight months with an explanatory

338

letter, said letter having been first approved by plaintiffs' attorney. Any AABD benefits received pursuant to this paragraph shall not be deemed income or resources under Article III of the Illinois Public Aid Code.

For those persons not presently receiving AABD:

(a) A certified letter (return receipt requested), said letter having been first approved by plaintiffs' attorney, shall be sent to the last known address of the person, informing him in concise and easily understandable terms that he is entitled to a specified amount of AABD benefits wrongfully withheld, and that he may claim such amount by contacting the County Department of Public Aid at a specified address, within 45 days from the receipt of said letter.

(b) If the County Department of Public Aid does not receive a claim for the AABD benefits within 45 days from the date of actual notice to the person, the right to said AABD benefits shall be forfeited and the file shall be closed. Persons who do not receive actual notice do not forfeit their rights to AABD benefits wrongfully withheld under this provision.

6. Within 15 days from the date of this decree, defendant EDWARD T. WEAVER, Director, Illinois Department of Public Aid, shall submit to the Court and the plaintiffs' attorney a detailed statement as to the method for effectuating the relief required by paragraph 5, supra, of this Decree. Any disputes between the parties as to whether the procedures and steps outlined by the defendant WEAVER will fulfill the requirements of this Decree will be resolved by the Court.

7. The defendants shall have the continuing obligation to submit to the Court and to the plaintiffs' attorney a detailed monthly report indicating the number of AABD applications disposed of by length of time from the date of application, for each county in the State of Illinois, and such other information which accurately reflects the time for processing AABD applications, until such time that such reports establish compliance with the terms of this order for six months.

8. Defendant EDWARD T. WEAVER, Director, Illinois Department of Public Aid, shall issue a bulletin of the Illinois Department of Public Aid incorporating the essence of this judgment within 15 days from the entry thereof.

9. This judgment shall be binding upon defendants, their officers, agents, servants, employees and their successors, and upon those persons in active concert or participation with them who receive actual notice of the judgment by personal service or otherwise.

10. The prayer of the plaintiffs for punitive damages against the defendant HAROLD O. SWANK is hereby denied.

11. This Court shall retain continuing jurisdiction over this cause for all purposes.

ENTER:

Alexander J. Napoli

Alexander J. Napoli, Judge
United States District Court

Dated: March 15, 1972

Illinois Department of Public Aid

MAG APPLICATIONS DISPOSED BY PROGRAM

Number and Percent Disposed Within Time Limits

MARCH 1973

	ADC-C	OAA	BA	BA	TOTAL
STATE	9,776	750	43	4,071	14,640
No. in time	9,702	717	36	4,037	14,492
% in time	99.2	95.6	83.7	99.2	99.0
DOWNSTATE	4,625	308	20	1,578	6,531
No. in time	4,617	304	17	1,565	6,503
% in time	99.8	98.7	85.0	99.2	99.6
COOK	5,151	442	23	2,493	8,109
No. in time	5,085	413	19	2,472	7,989
% in time	98.7	93.4	82.6	99.2	98.5
REGION 1A	488	28	-	173	689
No. in time	488	28	-	173	689
% in time	100.0	100.0	100.0	100.0	100.0
REGION 1B	658	33	-	193	884
No. in time	658	33	-	193	884
% in time	100.0	100.0	100.0	100.0	100.0
REGION 2	960	74	9	374	1,417
No. in time	954	71	6	361	1,392
% in time	99.4	95.9	66.7	96.5	98.2
REGION 3A	555	38	2	189	784
No. in time	555	38	2	189	784
% in time	100.0	100.0	100.0	100.0	100.0
REGION 3B	559	41	1	228	829
No. in time	557	40	1	228	826
% in time	99.6	97.6	100.0	100.0	99.6
REGION 4	825	53	2	264	1,144
No. in time	825	53	2	264	1,144
% in time	100.0	100.0	100.0	100.0	100.0
REGION 5	580	41	61	157	784
No. in time	580	41	61	157	784
% in time	100.0	100.0	100.0	100.0	100.0

Illinois Department of Public Aid

MAG APPLICATIONS DISPOSED BY PROGRAM

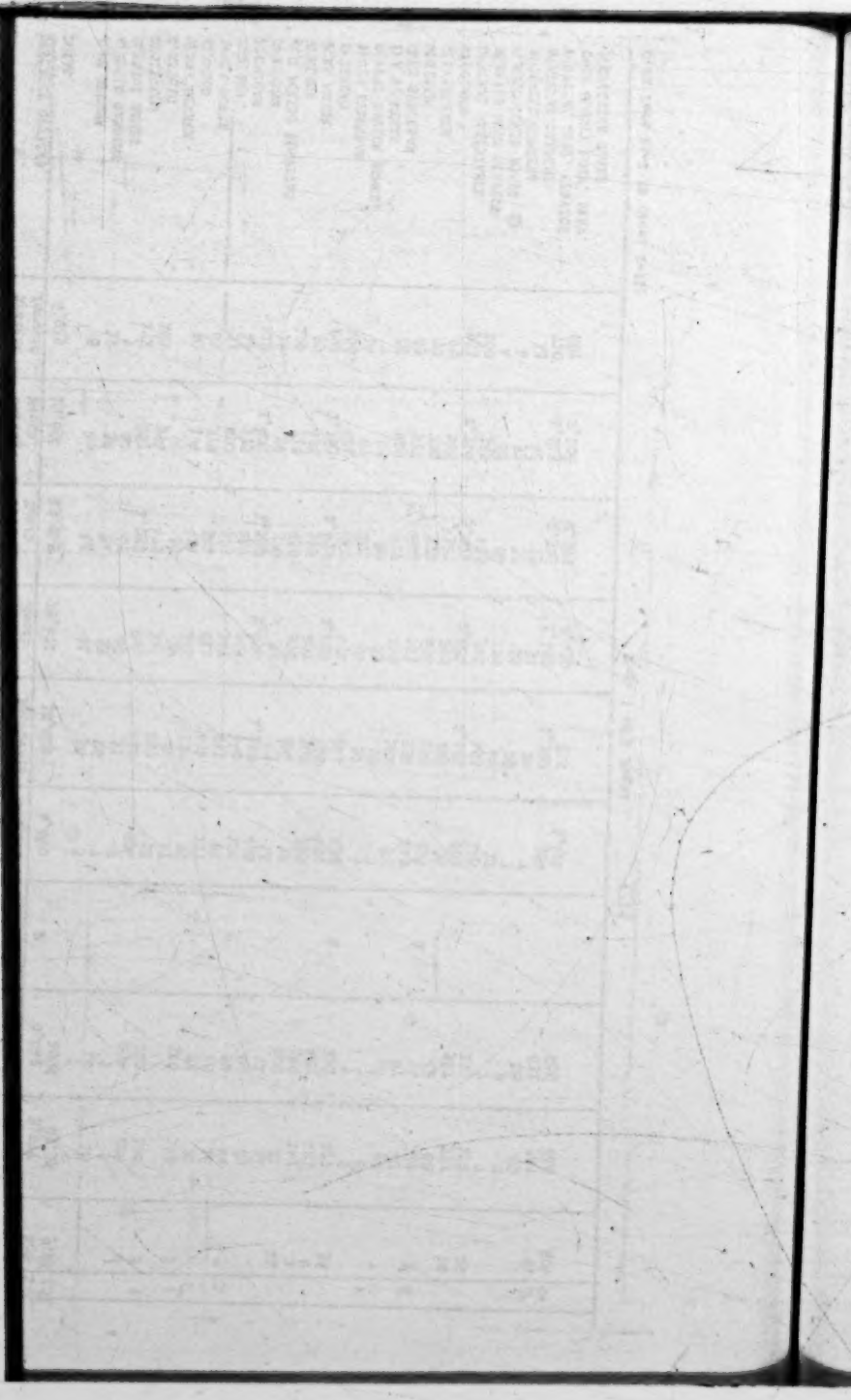
Number and Percent Disposed Within Time Limits

February 1973

	ADC-C	OAA	BA	DA	TOTAL
STATE	8,552	603	39	3,239	12,433
No. in time	8,420	564	37	3,198	12,219
% in time	98.5	93.5	94.9	98.7	98.3
DUPSTATE	4,140	252	17	1,212	5,621
No. in time	4,116	239	16	1,197	5,568
% in time	99.4	94.8	94.1	98.8	99.1
COOK	4,412	351	22	2,027	6,812
No. in time	4,304	325	21	2,001	6,651
% in time	97.6	92.6	95.5	98.7	97.6
REGION 1A	400	22	-	140	562
No. in time	399	22	-	139	560
% in time	99.8	100.0	-	99.3	99.6
REGION 1B	586	38	1	128	753
No. in time	586	34	1	128	749
% in time	100.0	89.5	100.0	100.0	99.5
REGION 2	815	61	8	295	1,179
No. in time	804	60	8	287	1,159
% in time	98.7	98.4	100.0	97.3	98.3
REGION 3A	457	37	2	107	603
No. in time	448	32	1	104	585
% in time	98.0	86.5	50.0	97.2	97.0
REGION 3B	573	24	2	165	764
No. in time	571	21	2	162	756
% in time	99.7	87.5	100.0	98.2	99.0
REGION 4	800	36	1	232	1,069
No. in time	799	36	1	232	1,068
% in time	99.9	100.0	100.0	100.0	99.9
REGION 5	509	34	3	145	691
No. in time	509	34	3	145	691
% in time	100.0	100.0	100.0	100.0	100.0

REPORT OF TOTAL APPLICATIONS ACTIVITY
FOR THE MONTH OF MAY, 1973

DISTRICT OFFICES	Brought Forward	Received During Month	On Hand During Month	DISPOSITIONS Total During Month	Approvals	Denials	Transfers Out	PENDING AT END OF M Total	Less Than 31 Days	31 thr 60 Days	Over 60 Days
TOTAL	4,019	15,894	19,913	15,471	10,629	4,840	2	4,442	3,977	408	57
								100%	89.5%	9.2%	1.3%
JANE ADDAMS	6	40	46	41	36	5		5	5		
ALTGELD GARDENS	19	32	51	33	26	7		18	18		
CABRINI HOMES	5	62	67	62	55	7		5	5		
ENGLEWOOD	171	867	1,038	804	600	204		234	228	6	
GARFIELD	101	374	475	355	297	58		120	116	3	1
HENRY HORNER		39	39	39	22	17					
KENWOOD	90	324	414	266	187	79		148	142	5	1
LAWNDALE NORTH	65	579	644	611	434	177		33	28		5
MADISON	33	290	323	307	243	64		16	16		
MICHIGAN	42	575	617	565	440	125		52	44	5	3
NORTHERN	118	1,421	1,539	1,450	1,152	298		89	89		
OAK FOREST HOSPITAL	14	56	70	59	43	16		11	11		
OAKLAND	126	332	458	356	284	72		102	61	41	
PARK MANOR	99	456	555	407	302	105		148	147	1	
SOUTHERN	292	1,163	1,455	1,028	598	430		427	423	4	
SOUTH SUBURBAN	186	481	667	474	241	232	1	193	157	36	
ROBERT TAYLOR HOMES	14	87	101	96	95	1		5	5		
IDA B. WELLS	7	53	60	53	50	3		7	6		1
WEST SUBURBAN	88	229	317	219	162	57		98	91	7	
WESTERN	63	577	640	553	334	219		87	87		
WOODLAWN	70	700	770	676	550	125	1	94	83	6	5
GENERAL ASSISTANCE	553	2,718	3,271	259	225	34		68	68		
NURSING HOME SERVICE	160	329	489	2,684	2,121	563		587	577	10	
HAROLD ICKES HOMES	4	62	66	318	193	125		171	152	19	
ROSWELL GARDENS	4	33	37	59	44	15		7	7		
STATEWAY GARDENS	13	46	59	35	28	7		2	2		
HOSPITAL ASST. SERVICE	710	1,613	2,323	31	24	7		28	28		
COOK COUNTY HOSP. SERV.	887	2,108	2,995	1,492	1,128	364		831	763	61	7
PROTECTIVE PAYEE				2,139	715	1,424		856	618	204	34



RESEARCH AND STATISTICS

REPORT OF OAA APPLICATIONS ACTIVITY
FOR THE MONTH OF MAY, 1973

DISTRICT OFFICES	Brought Forward	Received During Month	On Hand During Month	DISPOSITIONS: Total During Month	Approvals	Denials	Transfers Out	PENDING AT END OF: Total	Less Than 31 Days	31 thru 60 Days
TOTAL	65	409	474	398	305	93		76	76	
JANE ADDAMS	1	1	2	2	1	1				
ALTGELD GARDENS	1	1	2	2	2					
CABRINI HOMES		1	1	1	1					
ENGLEWOOD	4	35	39	30	23	7		9	9	
GARFIELD	2	8	10	7	5	2		3	3	
HENRY HORNER		1	1	1	1					
KENWOOD	5	28	33	18	12	6		15	15	
LOWER NORTH	4	26	30	30	21	9				
MADISON	3	18	21	21	16	5				
MICHIGAN	2	26	28	27	22	5		1	1	
NORTHERN		77	77	77	68	9				
OAK FOREST HOSPITAL		5	5	3	2	1				
OAKLAND	4	15	19	12	8	4		2	2	
PARK MANOR	4	20	24	18	11	7		7	7	
SOUTHERN	8	21	29	21	16	5		6	6	
SOUTH SUBURBAN	6	18	24	18	14	4		8	8	
ROBERT TAYLOR HOMES								6	6	
IDA B. WELLS	1	4	5	4	3	1				
WEST SUBURBAN	3	9	12	9	6	3		1	1	
WESTERN	2	16	18	16	6	10		3	3	
WICKER PARK	6	26	32	30	25	5		2	2	
WOODLAWN	2	12	14	8	6	2		2	2	
GENERAL ASSISTANCE	2	16	18	16	15	1		6	6	
NURSING HOME SERVICE	2	7	9	7	4	3		2	2	
HAROLD ICKES HOMES		5	5	5	4	1		2	2	
ROCKWELL GARDENS	1	1	2	2	2					
STATEWAY GARDENS		1	1							
HOSPITAL ASST. SERVICE	2	11	13	13	11	2		1	1	
COOK COUNTY HOSP. SERV.										
PROTECTIVE PAYEE										

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COOK COUNTY DEPARTMENT OF PUBLIC AID
RESEARCH AND STATISTICS

REPORT OF DA APPLICATIONS ACTIVITY
FOR THE MONTH OF MAY, 1973

DISTRICT OFFICES	Brought Forward	Received During Month	On Hand During Month	DISPOSITIONS				PENDING AT END OF			
				Total During Month	Approvals	Denials	Transfers Out	Total	Less Than 31 Days	31 thru 60 Days	(over 60
TOTAL	2	21	23	22	15	7		1	1		
JANE ADDAMS											
LITTLE GARDENS											
CABRINI HOMES											
ENGLEWOOD											
CARFIELD											
HENRY HORNER		1	1	1	1						
KENWOOD											
LOWER NORTH											
MADISON		1	1	1		1					
MICHIGAN	1	2	3	3	2	1					
NORTHERN		3	3	3	2	1					
OAK FOREST HOSPITAL		2	2	2	2						
OAKLAND											
PARK MANOR		1	1	1	1						
SOUTHERN											
SOUTH SUBURBAN											
ROBERT TAYLOR HOMES		2	2	2		2					
IDA B. WELLS											
WEST SUBURBAN		1	1	1	1						
WESTERN											
WICKER PARK	1	3	4	3	1	2					
WOODLAWN		1	1	1	1			1	1		
GENERAL ASSISTANCE											
NURSING HOME SERVICE		4	4	4	4						
HAROLD ICKES HOMES											
ROCKWELL GARDENS											
STATEWAY GARDENS											
HOSPITAL ASST. SERVICE											
COOK COUNTY HOSP. SERV.											
PROTECTIVE PAYEE											

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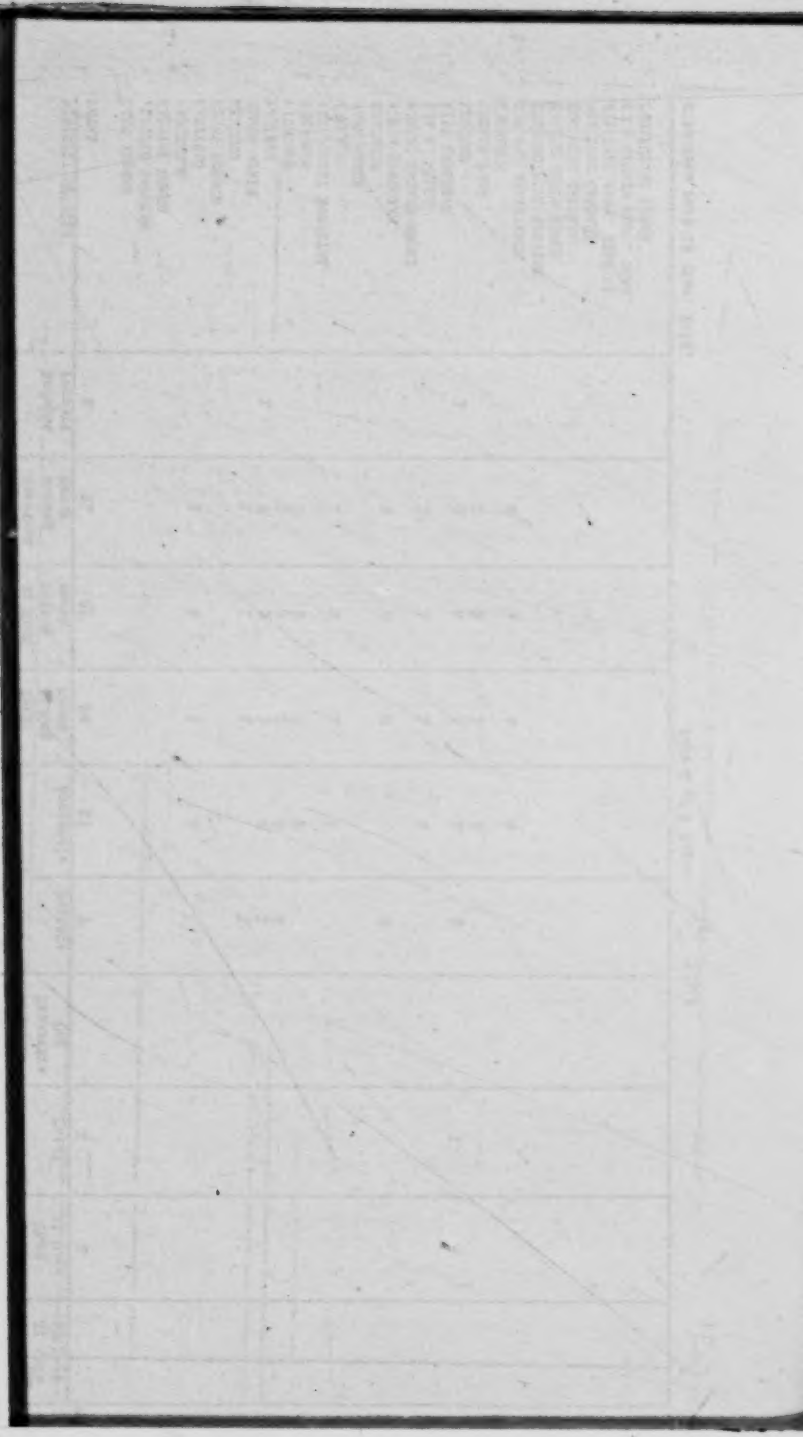

COOK COUNTY DEPARTMENT OF PUBLIC AID
RESEARCH AND STATISTICS

REPORT OF DA APPLICATIONS ACTIVITY
FOR THE MONTH OF MAY, 1973

DISTRICT OFFICES	Brought Forward	Received During Month	On Hand During Month	DISPOSITIONS: Total During Month	Approvals	Denials	Transfers Out	PENDING AT END OF MO: Total	Less Than 31 Days	31 thru 60 Days	(Ac... 60
TOTAL	446	2,347	2,793	2,197	1,777	420		596	538	56	2
JANE ADDAMS	1	2	3	3	3						
ALTGELD GARDENS	1	4	5	4	4						
CABRINI HOMES	1	3	4	4	4						
ENGLEWOOD	33	199	232	157	129	28		75	74	1	
GARFIELD	16	82	98	68	60	8		30	30		
HENRY HORNER		2	2	2	1	1					
KENWOOD	19	83	102	69	59	10		33	32	1	
LOWER NORTH	9	164	173	165	131	34		8	8		
MADISON	7	110	117	108	93	15		9	9		
MICHIGAN	7	104	111	104	90	14		7	7		
NORTHERN	16	350	366	347	292	55		19	19		
OAK FOREST HOSPITAL	4	13	17	13	10	3		4	4		
OAKLAND	22	95	117	106	95	11		11	11		
PARK MANOR	22	89	111	79	65	14		32	32		
SOUTHERN	58	190	248	175	129	46		73	73		
SOUTH SUBURBAN	60	99	159	73	19	54		86	60	26	
ROBERT TAYLOR HOMES	2	9	11	11	11						
IDA B. WELLS	3	8	11	9	9			2	2		
WEST SUBURBAN	21	59	80	50	37	13		30	25	5	
WESTERN	12	103	115	100	59	41		15	15		
WOODLAWN	19	60	79	168	132	36		27	27		
CENTRAL ASSISTANCE	23	187	210	61	58	3		18	18		
NURSING HOME SERVICE	55	69	120	174	172	2		36	36		
HAROLD ICKES HOMES		10	10	66	46	20		54	40	14	
ROSEWELL GARDENS		4	4	8	7	1		2	2		
STATEWAY GARDENS	2	2	4	4	3	1					
HOSPITAL ASST. SERVICE	22	67	89	2	1	1		2	2		
COOK COUNTY HOSP. SERV.				67	58	9		22	11	9	2
PROTECTIVE PAYEE											

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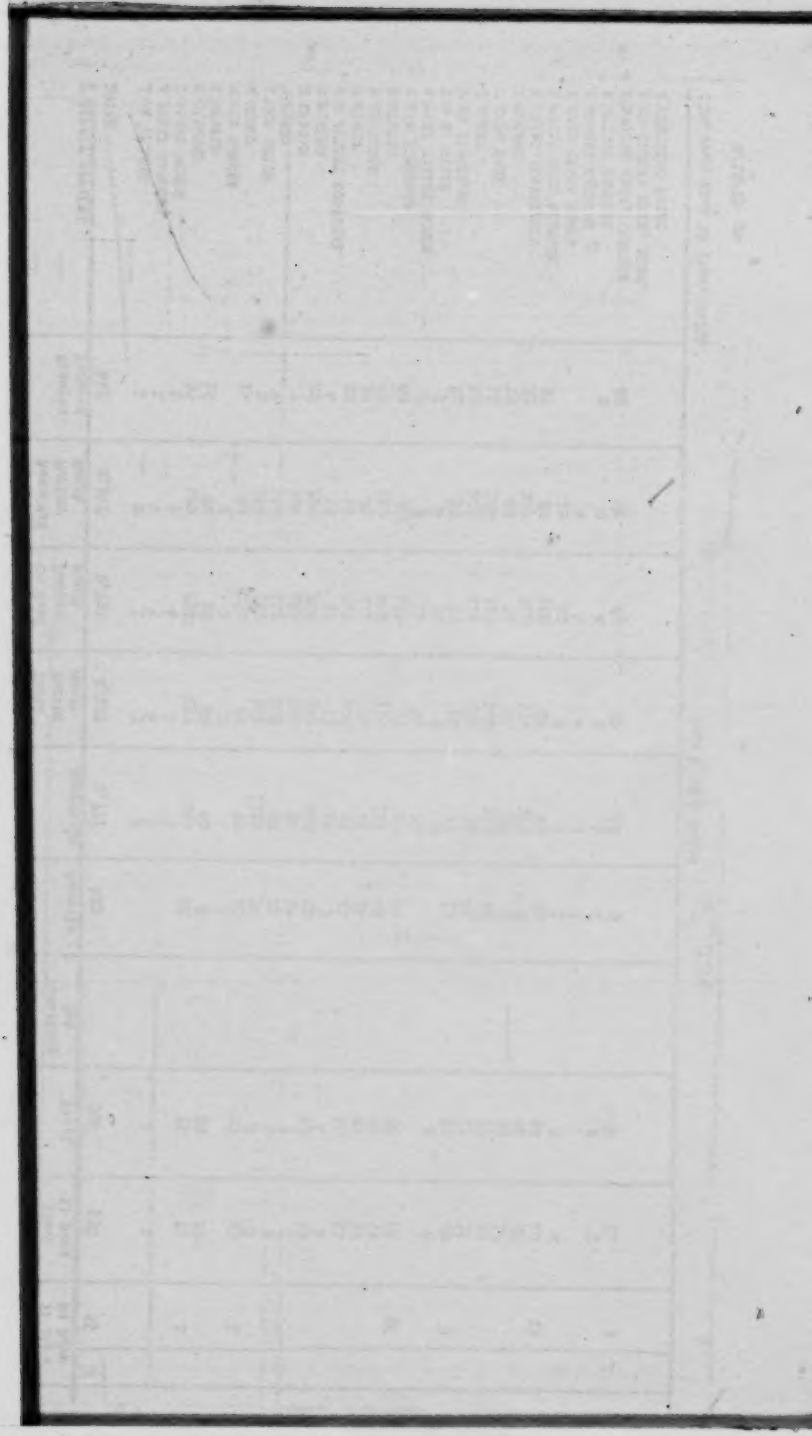

COOK COUNTY DEPARTMENT OF PUBLIC AID
RESEARCH AND STATISTICS

REPORT OF AFDC APPLICATIONS ACTIVITY
FOR THE MONTH OF MAY, 1973

DISTRICT OFFICES	Brought Forward	Received During Month	On Hand During Month	DISPOSITIONS: Total During Month	Approvals	Denials	Transfers Out	PENDING AT END OF: Total	Less Than 31 Days	31 thru 60 Days
TOTAL	776	4,902	5,678	4,711	3,384	1,327	-	967	960	6
JANE ADDAMS	-	-	-	-	-	-	-	-	-	-
AUSTIN GARDENS	2	15	17	16	15	1	-	1	1	-
CABRINI HOMES	6	18	24	12	10	2	-	12	12	-
ENGLEWOOD	3	32	35	33	29	4	-	2	2	-
GARFIELD	78	431	509	384	293	91	-	125	125	-
HENRY HORNER	54	184	238	182	149	33	-	56	56	-
KENWOOD	-	19	19	19	11	8	-	-	-	-
LAWNDALE NORTH	36	118	154	100	68	32	-	54	54	-
MADISON	25	266	291	285	182	103	-	6	6	-
MICHIGAN	14	87	101	98	68	30	-	3	3	-
NORTHERN	13	322	335	320	239	81	-	15	15	-
OAK FORREST HOSPITAL	45	679	724	678	519	159	-	46	46	-
OAKLAND	-	-	-	-	-	-	-	-	-	-
PARK MANOR	35	117	152	134	95	39	-	18	18	-
SOUTHERN	52	273	325	252	192	60	-	73	73	-
SOUTH SUBURBAN	177	714	884	626	339	287	-	258	258	-
ROBERT TAYLOR HOMES	77	294	371	301	171	130	-	70	70	-
IDA B. WELLS	7	46	53	51	50	1	-	2	2	-
WEST SUBURBAN	1	22	23	21	19	2	-	2	2	-
WESTERN	59	137	187	136	105	31	-	51	51	-
WICKER PARK	12	327	339	281	168	113	-	58	58	-
WOODLAWN	21	362	383	352	292	60	-	31	31	-
GENERAL ASSISTANCE	35	120	155	129	109	20	-	26	26	-
NURSING HOME SERVICE	19	164	183	172	167	5	-	11	11	-
HAROLD ICKES HOMES	-	-	-	-	-	-	-	-	-	-
ROSEWELL GARDENS	2	27	29	26	20	6	-	3	3	-
STATEWAY GARDENS	2	16	18	17	13	4	-	1	1	-
HOSPITAL ASST. SERVICE	4	20	24	13	11	2	-	11	11	-
COOK COUNTY HOSP. SERV.	13	92	105	73	50	23	-	32	25	6
PROTECTIVE PAYEE	-	-	-	-	-	-	-	-	-	-

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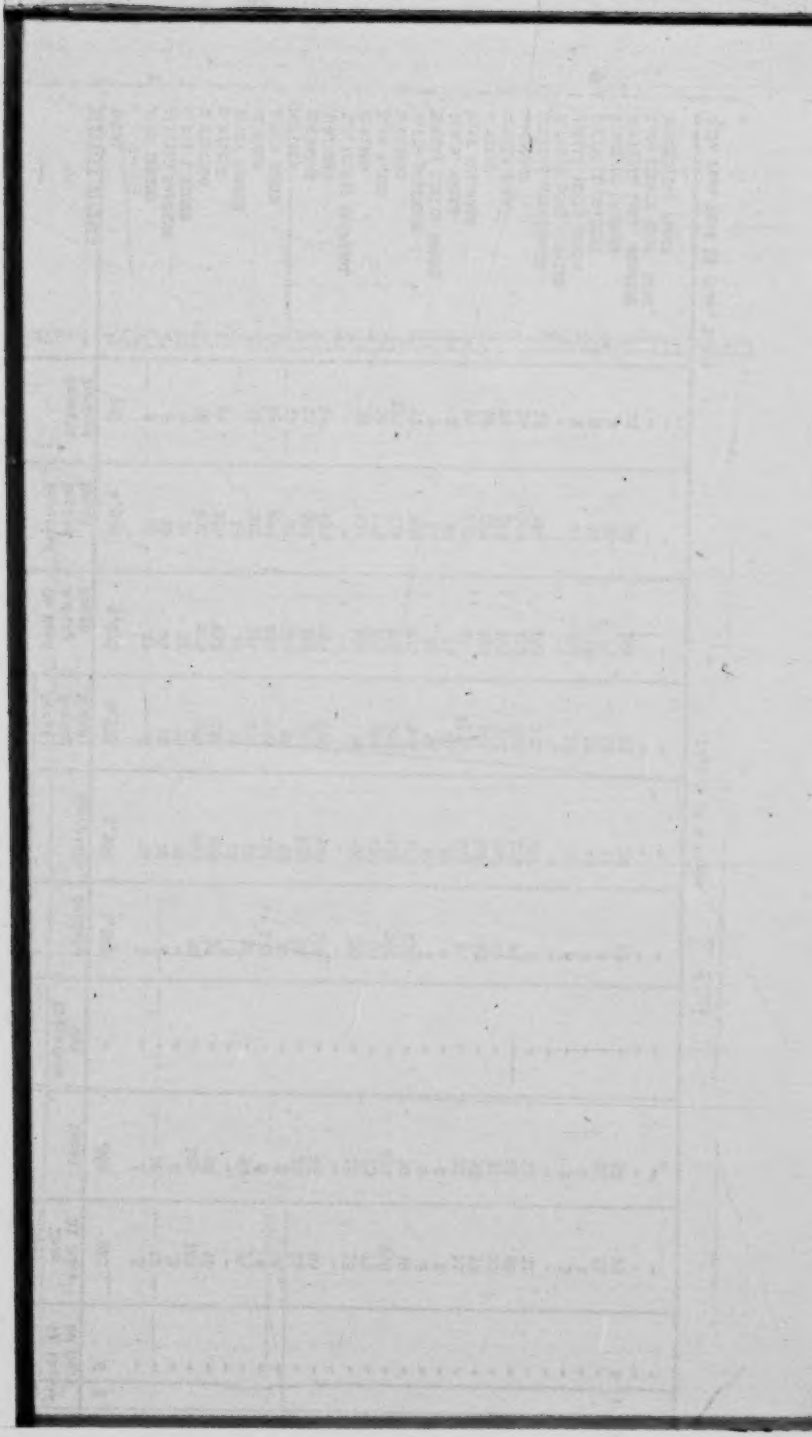

COOK COUNTY DEPARTMENT OF PUBLIC AID
RESEARCH AND STATISTICS

REPORT OF GA APPLICATIONS ACTIVITY
FOR THE MONTH OF MAY, 1973

DISTRICT OFFICES	Brought Forward	Received During Month	On Hand During Month	DISPOSITIONS: Total During Month	Approvals	Denials	Transfers Out	PENDING AT END OF M: Total	Less Than 31 Days	31 thru 60 Days
TOTAL	723	3,791	4,514	3,749	2,890	858	1	765	754	11
JANE ADDAMS										
ARCHER GARDENS	2	16	18	16	14	2		2	2	
ALTGELD HOMES	6	6	12	10	5	5		2	2	
ENGLEWOOD	1	20	21	20	20			1	1	
GARFIELD	23	134	157	153	117	36		4	4	
HENRY HORNER	18	85	103	83	72	11		20	19	1
KENWOOD		14	14	14	9	5				
LAWNDALE NORTH	14	71	85	60	40	20		25	25	
MADISON	4	108	112	105	81	24		7	7	
MICHIGAN	3	63	66	63	56	7		3	3	
NORTHERN	6	83	89	78	69	9		11	11	
OAK FOREST HOSPITAL	25	166	191	169	141	28		22	22	
OAKLAND										
PARK MANOR	15	81	96	84	70	14		12	12	
SOUTHERN	7	48	55	33	24	9		22	22	
SOUTH SUBURBAN	30	175	205	153	91	62		52	52	
ROBERT TAYLOR HOMES										
IDA B. WELLS	3	30	33	31	31			2	2	
WEST SUBURBAN		14	14	14	14					
WESTERN										
WICKER PARK	27	97	124	116	85	31		8	8	
WOODLAWN	10	104	114	104	89	14		10	10	
GENERAL ASSISTANCE	14	39	53	44	43	1	1	9	9	
NURSING HOME SERVICE	599	2,339	2,848	2,310	1,757	553		538	528	10
HAROLD ICKES HOMES										
RAMSELL GARDENS	1	16	17	16	10	6		1	1	
STATEWAY GARDENS		8	8	8	7	1				
HOSPITAL ASST. SERVICE	4	20	24	12	9	3		12	12	
COOK COUNTY HOSP. SERV.	2	54	55	53	36	17		2	2	
PROTECTIVE PAYEE										

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COOK COUNTY DEPARTMENT OF PUBLIC AID
RESEARCH AND STATISTICS

REPORT OF MA-NG APPLICATION ACTIVITY (Except DA)
FOR THE MONTH OF MAY, 1973

DISTRICT OFFICES	Brought Forward	Received During Month	On Hand During Month	DISPOSITIONS				PENDING AT END OF MONTH			
				Total During Month	Approvals	Denials	Transfers Out	Total	Less Than 31 Days	31 thru 60 Days	Over 60 Days
TOTAL	598	1,866	2,464	1,781	1,059	721	1	683	602	72	9
JANE ADDAMS	—	2	2	2	1	1					
ALTGELD GARDENS	3	3	6	3	3			3	3		
CABRINI HOMES		5	5	4	1	3		1	1		
ENGLEWOOD	4	48	52	45	23	22		7	7		
GARFIELD	4	11	15	10	7	3		5	5		
HENRY HORNER	—	1	1	1		1					
HYDEWOOD	5	13	18	10	5	5		8	8		
LOWER NORTH	3	8	11	9	5	4		2	1		1
MADISON	2	7	9	9	5	4					
MICHIGAN	2	22	24	18	9	9		6	6		
NORTHERN	2	105	107	106	84	22		1	1		
OAK FOREST HOSPITAL	9	31	40	37	29	8		3	3		
OAKLAND	2	20	22	16	13	3		6	6		
PARK MANOR	7	11	18	12	7	5		6	6		
SOUTHERN	10	32	42	27	16	11		15	15		
SOUTH SUBURBAN	20	41	61	50	22	27	1	11	11		
ROBERT TAYLOR HOMES	2	1	3	3	3						
IDA B. WELLS	1	3	4	4	4						
WEST SUBURBAN	7	14	21	16	10	6		5	5		
WESTERN	3	19	22	22	10	12					
WICKER PARK	4	16	20	16	9	7		4	3	1	
WOODLAWN	4	9	13	8	5	3		5	5		
GENERAL ASSISTANCE		3	3	3	2	1					
NURSING HOME SERVICE	76	216	292	209	119	90		83	83		
HAROLD ICKES HOMES		2	2	2	2						
ARCHWELL GARDENS		2	2	2	2						
SKYLINE GARDENS	2	2	4	3	2	1		1	1		
HOSPITAL ASST. SERVICE	189	540	729	489	382	107		240	232	7	1
COOK COUNTY HOSP. SERV.	237	679	916	645	279	366		271	200	64	7
PROTECTIVE PAYEE											

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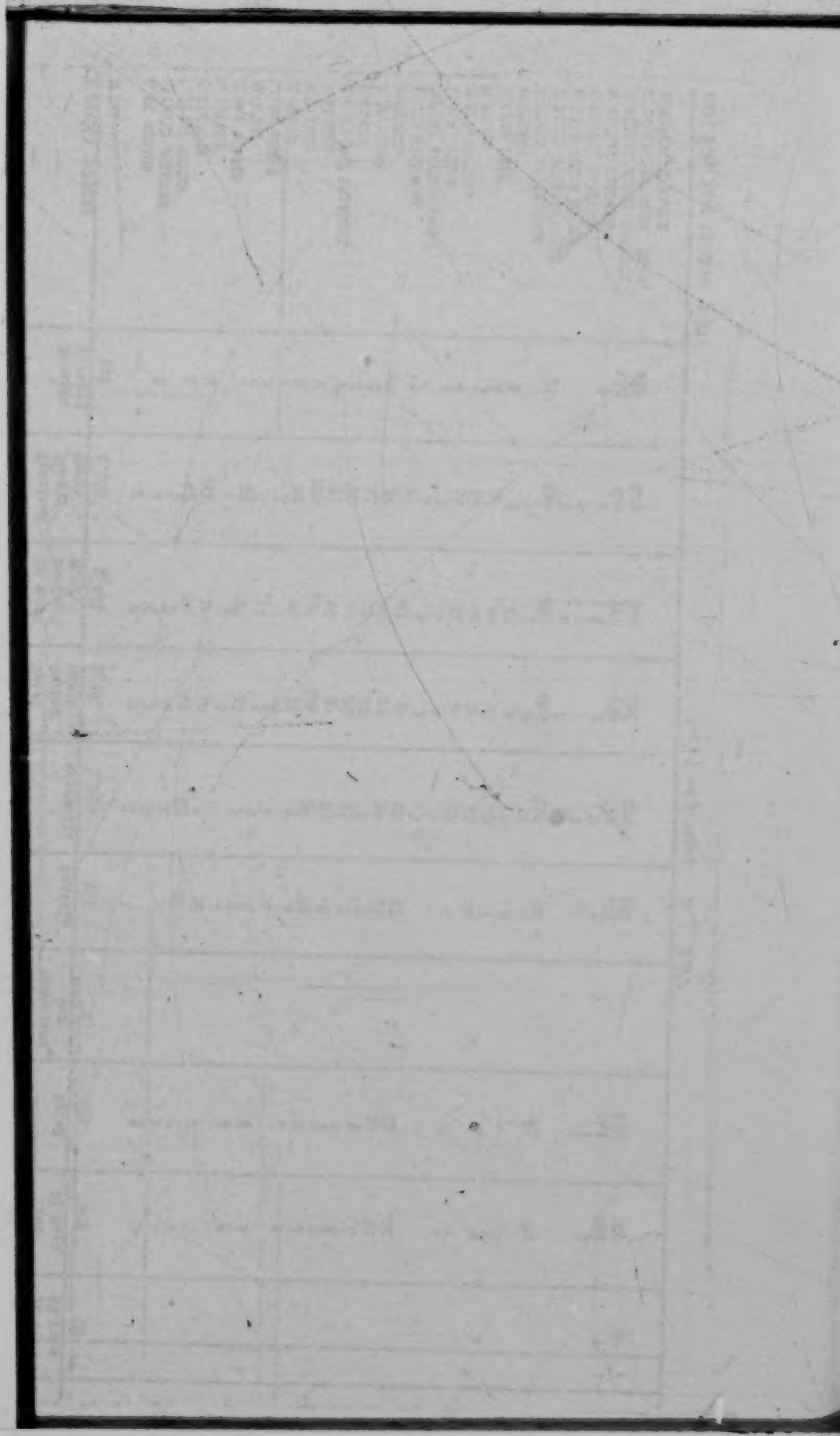

RESEARCH AND STATISTICS

REPORT OF MA-NG APPLICATIONS ACTIVITY (DA Only)
FOR THE MONTH OF MAY, 1973

Over 60

DISTRICT OFFICES	Brought Forward	Received During Month	On Hand During Month	DISPOSITIONS: Total During Month	Approvals	Denials	Transfers Out	PENDING AT END OF: Total	Less Than 31 Days	31 thru 60 Days	
TOTAL	737	1,223	1,960	1,197	590	607		763	562	171	30
JANE ADDAMS		4	4	2	2						
ALTGELD GARDENS	2		2	2	2			2	2		
CABRINI HOMES		1	1								
ENGLEWOOD	29	20	49	35	15	20		1	1		
GARFIELD	7	3	10	4	3	1		14	9	5	
HENRY HORNER		2	2	2		2		6	3	2	1
HENWOOD	11	11	22	9	3	6					
LOWER NORTH	20	6	26	11	14	2		13	8	4	1
MADISON	3	3	6	5	3	2		10	6		4
MICHIGAN	12	15	27	15	9	6		1	1		
NORTHERN	30	37	67	66	43	23		12	4	5	3
OAK FOREST HOSPITAL	1	7	8	6	2	4		1	1		
OAKLAND	48	3	51	3	2	1		2	2		
PARK MANOR	6	15	21	13	3	10		48	7	41	
SOUTHERN	16	31	47	26	7	19		8	8		
SOUTH SUBURBAN	23	27	50	30	15	15		21	17	4	
ROBERT TAYLOR HOMES		1	1					20	10	10	
IDA B. WELLS	1	1	2					1	1		
WEST SUBURBAN	7	10	17	8	4	4		2	1		
WESTERN	6	12	18	15	5	10		9	7	2	
WICKER PARK	18	7	25	5	2	3		3	3		
WOODLAWN	5	8	13	9	4	5		20	10	5	5
GENERAL ASSISTANCE		5	5	5	4	1		4	4		
NURSING HOME SERVICE	27	41	68	36	24	12					
HAROLD ICKES HOMES	1	2	3	2	1	1		32	27	5	
ROSEWELL GARDENS	1	2	3	2	1	1		1	1		
STATEWAY GARDENS	1	1	2	1	1			1	1		
HOSPITAL ASST. SERVICE	334	414	748	385	307	78		1	1		
COOK COUNTY HOSP. SERV.	128	534	662	495	114	381		363	330	30	3
PROTECTIVE PAYEE								167	97	58	12

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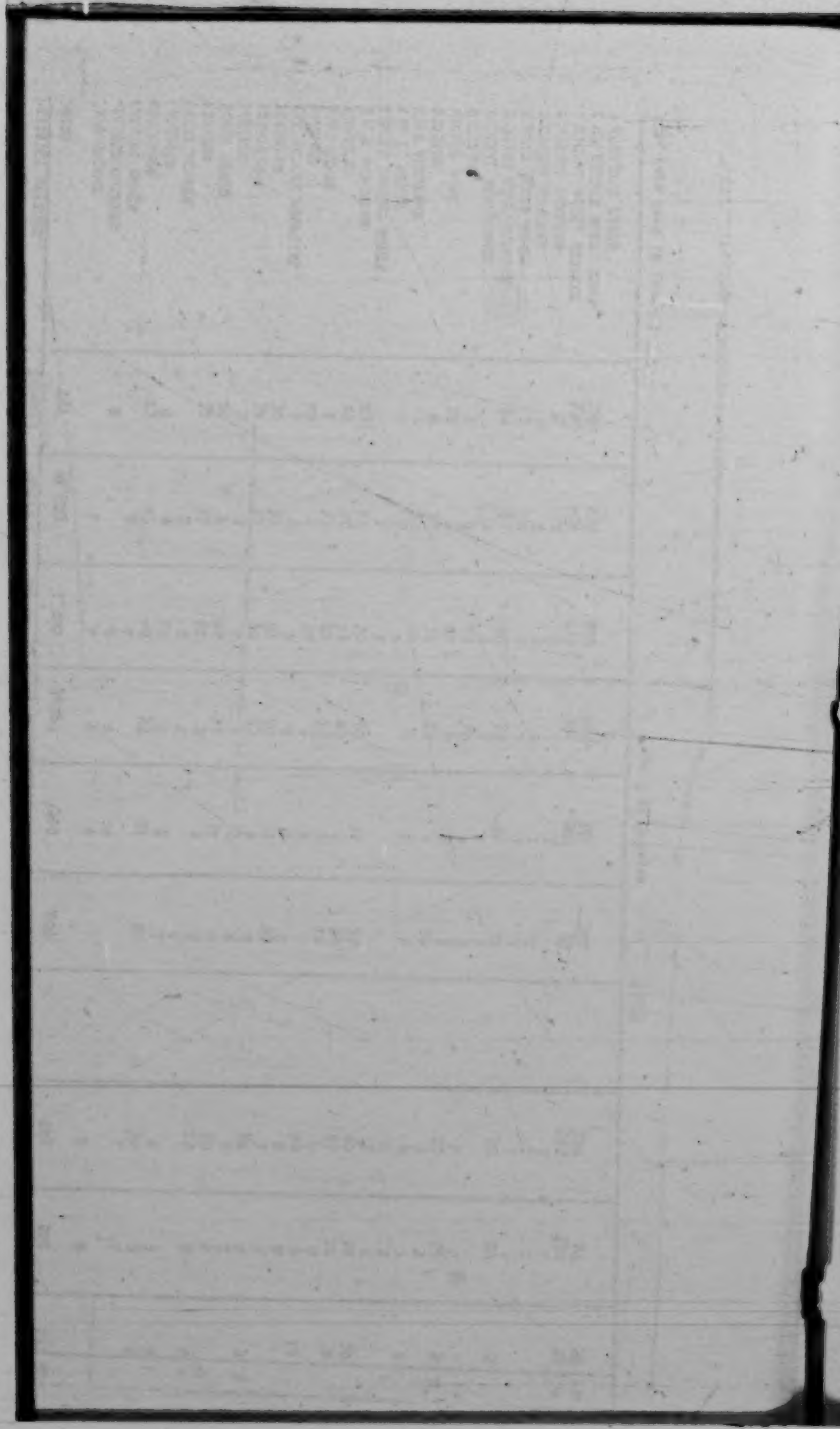

COOK COUNTY DEPARTMENT OF PUBLIC AID
RESEARCH AND STATISTICS
AXT &
REPORT OF AMIV APPLICATIONS ACTIVITY
FOR THE MONTH OF MAY, 1973

DISTRICT OFFICES	Brought Forward	Received During Month	On Hand During Month	DISPOSITIONS: Total During Month	Approvals	Denials	Transfers Out	PENDING AT END OF: Total	Less Than 31 Days	31 thru 60 Days
TOTAL	672	1,335	2,007	1,416	609	807		591	484	92
JANE ADDAMS										
ARCHER GARDENS										
CABRINI HOMES										
ENGLEWOOD										
GARFIELD										
HENRY HORNER										
KENWOOD										
LAKE NORTH										
MADISON										
MICHIGAN										
NORTHERN										
OAK FOREST HOSPITAL		5	5	5	3	2				
OAKLAND										
PARK MANOR										
SOUTHERN	1		1					1		1
SOUTH SUBURBAN										
ROBERT TAYLOR HOMES										
IDA B. WELLS										
WEST SUBURBAN										
WESTERN										
WICKER PARK										
WOODLAWN										
GENERAL ASSISTANCE										
NURSING HOME SERVICE										
HAROLD ICKES HOMES										
ROCKWELL GARDENS										
STATEWAY GARDENS										
HOSPITAL ASST. SERVICE	149	435	584	412	284	128		172	163	9
COOK COUNTY HOSP. SERV.*	522	895	1,417	999	322	677		418	321	82
PROTECTIVE PAYEE										

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Supreme
F I
APR
MICHAEL R

No. 72-1410

In the

Supreme Court of the United States

OCTOBER TERM, 1972

JOEL EDELMAN, DIRECTOR OF ILLINOIS DEPARTMENT OF PUBLIC AID, AND SUCCESSOR TO EDWARD WEAVER, FORMER DIRECTOR OF PUBLIC AID, *Petitioner*,

vs.

JOHN JORDAN, et al., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

WILLIAM J. SCOTT,
Attorney General of the State of Illinois
160 N. LaSalle Street
Chicago, Illinois

DONALD S. CARNOW,
Special Assistant Attorney General
300 W. Washington Street
Chicago, Illinois

April 16, 1973

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	8
THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND DECISIONS OF THIS HONORABLE COURT WITH RESPECT TO THE PROPER APPLICATION OF THE ELEVENTH AMENDMENT	8
UNDER STANDARDS ENUNCIATED BY THIS COURT FOR DETERMINING THE EFFECT TO BE GIVEN A JUDGMENT, THE FACTS IN THE INSTANT CASE MANDATE PROSPECTIVE APPLICATION ONLY	18
FEDERAL REGULATIONS RELIED UPON BY PLAINTIFF ARE INCONSISTENT WITH THE APPLICABLE PROVISIONS OF THE SOCIAL SECURITY ACT AND ARE THEREFORE INVALID	22
Conclusion	28
Appendix A	

CASES

Almenares v. Wyman, 344 F. Supp. 512 (S.D. N.Y., 1971)	24

PAGE

Bingham's Trust v. Commissioner of Internal Revenue, 325 U.S. 365 (1945) 24

Bowles v. Mutual Benefit Health & Accident Association, 99 F. 2d 44 (4th Cir. 1938) 25

Bromley v. McCaughn, 280 U.S. 124 (1929) 16

Bryson v. Burson, 308 F. Supp. 1170 (N.D. Ga. (1969) 18

Campbell v. Galeno Chemical Co., 281 U.S. 599 (1930) 24

Carolina Glass Company v. South Carolina, 240 U.S. 305 (1916) 10

Chapman v. Telex, Inc., 129 F. Supp. 567 (N.D. Ga. 1954) 25

Chevron Oil Co. v. Hudson, 404 U.S. 97 (1971) 18, 19

Commissioner of Internal Revenue v. Winslow, 113 F. 2d 418 (1st Cir. 1940). 26

Connecticut State Department of Public Welfare v. Department of HEW, 448 F. 2d 209 (2nd Cir. 1971) 24

Cooper v. Laupheimer, 316 F. Supp. 264 (E.D. Pa. 1970) 25

Deeg v. Lumbermen's Mut. Cas. Co., 279 F. 2d 491 (10th Cir. 1960) 26

Duhne v. New Jersey, 251 U.S. 311 (1920) 11

Ex Parte New York, 256 U.S. 490 (1921) 11

Fishgold v. Sullivan Drydock & Repair Corp., 154 F. 2d 785 (2nd Cir.) aff'd. 328 U.S. 275 (1946) 26, 27

Folsom v. Pearsall, 245 F. 2d 562 (9th Cir. 1957) 26

Ford Motor Company v. Department of Treasury, 323 U.S. 459 (1944) 10

Great Northern Life Insurance Company v. Reed, 322 U.S. 47 (1944) 10

PAGE

Great Northern Railway v. Sunburst Oil and Refining Co., 287 U.S. 358 (1932) 18

Hagood v. *Southern*, 117 U.S. 52 (1886) 9, 10

Hans v. *Louisiana*, 134 U.S. 1 (1890) 11

Illinois Steel Co. v. *Baltimore & Ohio R.R. Co.*, 320 U.S. (1944) 25

In Re Petition of Chin Thloot Har Wong, 224 F. Supp. 155 (S.D. N.Y. 1963) 27

Jordy v. *Dunliere*, 77 S.E. 162 (Ga. 1913) 25

Larson v. *Domestic and Foreign Commerce Corporation*, 337 U.S. 682 (1949) 9

Lemon v. *Kurtzman*, 41 Lw. Wk. 4467 (1973) 19

Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 20

Like v. *Carter*, 41 Law Week 2406 (DC Mo. 1973) 8

Linkletter v. *Walker*, 381 U.S. 618 (1965) 18, 19

P. Lorillard Co. v. *FTC*, 267 F. 2d 439 (3rd Cir.), cert. den., 361 U.S. 923 (1959) 27

Louisiana v. *Jumel*, 107 U.S. 711 (1883) 9, 10

Louisiana ex rel. New York Guarantee and Indemnity Company v. *Steele*, 134 U.S. 230 (1890) 9

Machado v. *Hackney*, 299 F. Supp. 644 (W.D. Tex. 1969) 18

Merritt v. *Welsh*, 104 U.S. 694 (1882) 23

Mine Safety Appliance Company v. *Forestal*, 326 U.S. 371 (1945) 10

Murray v. *Wilson Distilling Company*, 213 U.S. 151 (1909) 10

Naganab v. *Hitchock*, 202 U.S. 473 (1906) 10

PAGE

North Carolina v. *Temple*, 134 U.S. 22 (1890) 9

Parden v. *Terminal R. of Alabama Dock Dept.*, 377 U.S. 184 (1964) 11

Rankin v. *Emigh*, 218 U.S. 27 (1910) 17

Rosado v. *Wyman*, 322 F. Supp. 1173 (1969) 5

Rosado v. *Wyman*, 397 U.S. 397 (1970) 15, 16

Rothstein v. *Wyman*, 467 F.2d 226 (CA2, 1972), cert. denied, 41 Law Week 3527 ..... 8, 11, 13, 16

S.E.C. v. *Sterling Precision Corp.*, 393 F.2d 214 (2nd Cir. 1968) 27

Sims v. *U.S.*, 252 F.2d 434 (4th Cir. 1958) 26

Smith v. *Reeves*, 178 U.S. 436 (1900) 11

State of Arizona v. *Richardson*, No. CIV 71-563 (D. Ariz. June 16, 1972) 27

United States v. *Mississippi*, 380 U.S. 128 (1965) 11

United States v. *Scardino*, 414 F. 2d 925 (5th Cir. 1969) 18

United States v. *Scotts*, 425 F.2d 55 (9th Cir. 1970) 18

Volkswagenwerk v. FMC, 390 U.S. 261 (1968) 26

Waite v. Macy, 246 U.S. 606 (1918) 24

Williams v. Dandridge, 297 F. Supp. 450 (D.Md. 1968) 26

Wisconsin Bridge and Iron Co. v. Industrial Commission, 268 Wis. 314, 67 N.W. 2d 378 (1954) 24

Woods v. Benson Hotel Corp., 177 F. 2d 543 (8th Cir. 1949) 26

Young v. Higbee, 324 U.S. 204 (1944) 16

PAGE

Statutes

28 U.S.C. 1254 (1) 2
42 U.S.C. 302(a)(4) 23
42 U.S.C. 303-306 3
42 U.S.C. 602 (a)(4) 23
42 U.S.C. 1201-1206 ..... 3, 23
42 U.S.C. 1302 3
42 U.S.C. 1351-1355 ..... 3, 23
42 U.S.C. 1381-1385 ..... 3, 23
Ill. Rev. Stat., Ch. 23 §§ 3-1 to 3-12 (1971) 3
Ill. Rev. Stat. Ch. 23 §§ 12-13 3

Constitutional Provision

Eleventh Amendment To U.S. Constitution 2, 9

Regulations

Illinois Categorical Assistance Manual § 4004 ..... 3, 4
45 C.F.R. § 206.10(a) 3, 4, 22

Miscellaneous Authorities

"Administrative or Practical Construction of Statute As Precedent For Judicial Construction", 84 L.Ed. 28 (1939) 26
Davis, Administrative Law Treatise, Section 5.06, pp. 326-328 (1958) 26
Jaffee, "Suits Against Government and Officers: Sovereign Immunity", 77 Harv. L. Rev. 1-29 (1963) 11
Restatement of Restitution, Sections 1, 3, 107 and Comment B 17

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No.

JOEL EDELMAN, DIRECTOR OF ILLINOIS DEPARTMENT OF PUBLIC AID, AND SUCCESSOR TO EDWARD WEAVER, FORMER DIRECTOR OF PUBLIC AID, *Petitioner,*

vs.

JOHN JORDAN, et al., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioner Joel Edelman, Director of the Illinois Department of Public Aid, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 18, 1973.

OPINION BELOW.

The opinion of the Court of Appeals for the Seventh Circuit is not yet reported, and hence appears in the appendix hereto.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 18, 1973. No petition for rehearing was filed. This petition for certiorari was filed within 90 days of the date of the entry of the Court of Appeals opinion. The Court's jurisdiction is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED.

(1) Whether an action by a citizen for retroactive welfare payments between July 1, 1968, and April 16, 1972, against the State of Illinois is maintainable in view of the provisions of The 11th Amendment to the United States Constitution.

(2) Whether under standards established by this Honorable Court, only prospective application should be given to a judgment which holds that provisions of the Illinois Department of Public Aid manual permitting application for aid to the aged and blind to remain undecided more than thirty days for aid to the disabled more than sixty days are inconsistent with regulations promulgated by the Department of Health, Education and Welfare under the Social Security Act.

CONSTITUTIONAL PROVISIONS INVOLVED.

Eleventh Amendment to the United States Constitution.

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens of Subjects or another foreign State."

STATEMENT OF THE CASE.

John Jordan, plaintiff-respondent (hereinafter "plaintiff"), filed a complaint in the United States District Court for the Northern District of Illinois, individually and as representative of a class, seeking injunctive relief and damages for violations of federal welfare regulations against Edward T. Weaver and Harold O. Swank, former Directors of the Illinois Department of Public Aid; David L. Daniel, Director of the Cook County Department of Public Aid; and Edward J. Barrett, Comptroller of Cook County, defendants-appellants (hereinafter "defendants").

Specifically, plaintiffs alleged that Section 4004, and sub sections thereunder, of the Illinois Categorical Assistance Manual (set forth in the Record at page 169) were invalid as being inconsistent with thirty-day and sixty-day determination requirements as defined by the United States Department of Health, Education and Welfare ("HEW") in 45 C.F.R., Section 206.10(a) (Record page 131). Defendant answered denying the material allegations of the complaint.

Aid to the Aged, Blind and Disabled ("AABD") is one of the categorical programs administered by the Illinois Department of Public Aid ("IDPA") pursuant to the Illinois Public Aid Code, Ill. Rev. Stat., Ch. 23, Sections 3-1 to 3-12 (1971). The program is funded 50% by the State. The other 50% is provided by the Federal Government under the Social Security Act, 42 U.S.C., Sections 303-306; 1201-1206; 1351-1355; 1381-1385 (1971). The IDPA issued regulations pursuant to Ill. Rev. Stat. Ch. 23, Sections 12-13 (1971), and HEW, which administers AABD for the Federal Government, promulgated regulations pursuant to 42 U.S.C., Section 1302 (1971). Plaintiffs contended that the IDPA was required to process all applica-

tions for welfare assistance for the aged, blind and disabled within thirty days of the initial application. Having failed to process such applications within the specified time, so plaintiffs contended, the plaintiff class was entitled to monetary award, commencing on July 1, 1968, to be computed by the amount of money the members of the class would have received had the applications been processed within 30 days. Plaintiff also sought punitive damages in the amount of $100,000 against defendant Harold O. Swank. In subsequent Amended Complaints filed in the U.S. District Court, plaintiffs alleged that applications for benefits to the disabled had to be processed within 60 days under HEW regulations.

Defendants never claimed that all such applications were processed within 30 or 60 days. Indeed, defendants pointed out that some applications take longer to process than others because of the various factors which must be determined in order to established the eligibility of particular applicants.[1]

The District Court granted summary judgment for plaintiffs and issued a Memorandum Opinion and Order on February 4, 1972 (Record, page 321). On March 15, 1972, the District Court entered a Judgment Order (Record, pages 335-337) which provided, *inter alia,* that:

> 1.) The IDPA and the individual defendants be permanently enjoined from failing to make determinations of eligibility within 30 days of initial application for aid to the aged and blind under the Illinois AABD program, and within 60 days from the date of application as to applicants for aid to the disabled under the AABD program;

[1] Brief in Opposition to Plaintiff's Motion for Summary Judgment, page 7.

2.) Aid for those found eligible be initiated not later than the final date for eligibility determination;

3) 45 C.F.R., Section 206.10(a), be strictly complied with and any inconsistent provisions in the Illinois Categorical Assistance Manual (namely, Section 4004) be declared invalid insofar as inconsistent with that regulation.

The Court also found for the plaintiff on the monetary award question. It required defendants to make all payments not made to all applicants who had applied to the IDPA for AABD benefits between July 1, 1968 and April 16, 1972, and were subsequently determined eligible by the IDPA, as follows:

(a) For those aged and blind applicants whose first full AABD check was not mailed within thirty days from the date of application, damages were to be paid by the State of Illinois to all eligible applicants equal to the AABD assistance they would have received for the period beginning with the thirtieth day from the date of application to the date the applicant's entitlement became effective.

(b) (i) For those disabled applicants who applied between July 1, 1968 and December 31, 1970, whose first full AABD check was not mailed within forty-five days from the date of application, damages were to be paid by the State of Illinois to all eligible applicants equal to the AABD assistance they would have received for the period beginning with the forty-fifth day from the date of application to the date the applicant's entitlement became effective;

(ii) For those disabled applicants who applied between January 1, 1971 and April 16, 1971, whose first full AABD check was not mailed within sixty days from the date of application, damages were to be paid by the State of Illinois to all eligible applicants equal to the AABD assistance they would have received

for the period beginning with the sixtieth day from the date of application to the date the applicant's entitlement became effective. (Record, page 338.)

The Court required these AABD benefits to be mailed by the defendant to those persons currently receiving AABD within eight months with an explanatory letter, approved by Plaintiffs' attorney.

For those persons not presently receiving AABD from the IDPA, the Court required this action:

(a) A certified letter (return receipt requested), approved by plaintiffs' attorney, must be sent to the last known address of any person who is eligible under the program for damage payments set out above, informing him that he is entitled to a specified amount of AABD benefits wrongfully withheld. That person may claim the amount, computed under the damage formula, by contacting the appropriate County Department of Public Aid within 45 days from the receipt of said letter.

(b) If the appropriate County Department of Public Aid does not receive a claim for the AABD benefits within 45 days from the date of actual notice to the person, the right to said AABD benefits shall be forfeited and the file shall be closed. The Court also declared that persons who do not receive actual notice do not forfeit their rights to AABD benefits wrongfully withheld under this provision. (Record 339.)[2]

An appeal then followed to the Court of Appeals. It was based on substantially the same grounds as are raised in this petition for writ of certiorari; in particular, it was

[2] The District Judge stayed the retroactive payments portion of his decree pending appeal to this Court.

pointed out that an action for a monetary award filed against state officials in their official capacity, the award to be discharged out of the Illinois General Revenue Fund, could not be maintained in the federal district court in view of the provisions of the Eleventh Amendment to the United States Constitution. The Seventh Circuit Court of Appeals rejected that contention, and found that a retroactive monetary award given to welfare recipients did not contravene the prohibitions of the Eleventh Amendment to the United States Constitution.

This petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND DECISIONS OF THIS HONORABLE COURT WITH RESPECT TO THE PROPER APPLICATION OF THE ELEVENTH AMENDMENT.

The issues in this appeal are identical to those presented in *Rothstein* v. *Wyman*, 467 F.2d 226 (CA 2, 1972), cert. denied, 41 Law Week 3527 (Docket No. 72-5831), and *Like* v. *Carter*, 41 Law Week 2406 (DC Mo., 1973).

The disposition of the question raised in this petition is of crucial importance to the State of Illinois since the State must be in the financial position to match its expectant costs of administering state government against its anticipated revenue. The financing of state government, for example in Illinois, is unlike that of the Federal Government. States are unable to finance budgetary deficits with either the application of monetary controls or the ability of a federal reserve open market committee to use treasury bills and notes to raise required sums of money for additional financial outlays. The state's ability to borrow is severely restricted by statutes. Hence, a state must rely upon its ability to project and raise revenue under various revenue raising schemes, limited though as they are, such as state income taxes, retailers occupation taxes, use taxes and other sundry revenue measures; the state's cash outgo must be conscientiously controlled by strict adherence to budgetary processes. The reason for that strict control lies in the limited financial resources available to local and state government.

The question whether a federal district court may entertain jurisdiction over a claim for retroactive welfare benefits purported to be wrongfully withheld has substantial

impact upon the ability of local government to function and meet its responsibilities under its various statutory obligations.

Historically, the Eleventh Amendment has been held a bar to an action in the U.S. District which sought to obtain state governmental funds or property. In such instances, this Honorable Court has held that such an action is barred by the Doctrine of Sovereign Immunity embodied in the Eleventh Amendment.

In the following cases, this Court has emphasized that, even if unconstitutional conduct was involved, a request for affirmative relief, though nominally directed against an officer of the state, was precluded because of the state's immunity from suit. For example, in *Louisiana* v. *Jumel,* 107 U.S. 711 (1883), where the plaintiffs had instituted actions to compel state officials to levy and collect certain taxes in order to carry out the state's obligations under bonds issued by the state, it was held that the action could not be maintained because of the state's immunity from suit. It was said that the remedy sought, to be complete, would require the Court to assume the executive authority of the state, insofar as it related to the enforcement of the law requiring collection of additional taxes. See also *Hagood* v. *Southern,* 117 U.S. 52 (1886); *North Carolina* v. *Temple,* 134 U.S. 22 (1890); *Louisiana ex rel. New York Guarantee and Indemnity Company* v. *Steele,* 134 U.S. 230 (1890); and dicta in *Larson* v. *Domestic and Foreign Commerce Corporation,* 337 U.S. 682 (1949).

In still another large number of cases it has been emphasized that even if an officer's conduct is unconstitutional, the action against the officer is barred by the doctrine of governmental immunity if the purpose of the

action is to obtain government funds or to obtain property which is in the government's possession, or to control the disposition of property in the government's possession.

For example, in *Murray* v. *Wilson Distilling Company*, 213 U.S. 151 (1909), the plaintiff sought to enjoin members of the state's Liquor Dispensary Commission from disposing of funds without paying the plaintiff's claim for liquor purchased by the Commission. Although the plaintiff claimed that the Commission's funds constituted a trust fund for the benefit of those who had claims against the Commission, this Court rejected that contention and held that the funds belonged to the state, thus making an action involving the funds one against the state, prohibited by the doctrine of Sovereign Immunity embodied in the Eleventh Amendment. See also the holdings in *Louisiana* v. *Jumel, supra; Hagood* v. *Southern*, supra; *Naganab* v. *Hitchcock*, 202 U.S. 473 (1906); *Carolina Glass Company* v. *South Carolina*, 240 U.S. 305 (1916); *Great Northern Life Insurance Company* v. *Reed*, 322 U.S. 47 (1944); *Ford Motor Company* v. *Department of Treasury*, 323 U.S. 459 (1944); and *Mine Safety Appliance Company* v. *Forestal*, 326 U.S. 371 (1945).

Additionally, the Eleventh Amendment has been held a bar to suits for monetary awards to compensate for personal injuries or property damages under a federal statute. *Parden* v. *Terminal R. Co.*, 377 U.S. 184, 186 (1964) (suit for damages for personal injury under the FELA); *Ex parte New York* 256 U.S. 490 (1921) (an admiralty suit for property damages due to negligence). Such cases exemplify the firmly rooted tradition that consent is required to impress treasury liability for a tort. The whole area is extremely sensitive because liability is imprecise in amount, and could lead to great fiscal disruption of

the body politic. See Jaffee, *Suits Against Government and Officers: Sovereign Immunity;* 77 Harv. Law Rev. 1-29 (1963).

It is respectfully submitted that the judgment of the District Court and the Seventh Circuit Court is in direct contravention of the decisions of this Court and the recent decision of the Second Circuit Court of Appeals in *Rothstein* v. *Wyman* (2nd Cir. 1972), 467 F.2d 226.

An action against the Director of the Illinois Department of Public Aid for welfare benefits purportedly wrongfully withheld, is barred by the doctrine of sovereign immunity. While the language of the XIth Amendment bars only suits by citizens of one state against another state, a long line of decisions of this Court consistently held that a suit by the citizen of a state against his own state, absent the consent of the state, is equally not maintainable. See *e.g., Parden* v. *Terminal R. of Alabama Dock Department,* 377 U.S. 184, 186 (1964), and cases cited therein. See also *United States* v. *Mississippi,* 380 U.S. 128, 140 (1965). A state is not divested of its immunity merely because the case is one arising under the Constitution or laws of the United States. *Hans* v. *Louisiana,* 134 U.S. 1, 10 (1890). See also *Ex parte New York,* 256 U.S. 490 (1921); *Duhne* v. *New Jersey,* 251 U.S. 311 (1920); *Smith* v. *Reeves* 178 U.S. 436 (1900)

Rothstein v. *Wyman* (2nd Cir. 1972), 467 F.2d 226, dealt with the same subject matter as is involved here. Yet, contrary to the decision of the Seventh Circuit Court in this case, the Second Circuit Court in *Rothstein* held that the Eleventh Amendment barred an action in the U.S. District Court for the release of benefits, supposedly wrongfully withheld. The Court said (467 F.2d 226 at 236):

Wholly apart from what we have found to be an improper exercise of equity jurisdiction by the District Court in ordering retroactive payments, there is a very serious question as to whether such jurisdiction exists at all. The Eleventh Amendment provides that the federal judicial power does not extend to suits against a state, and appellants press strongly upon us the proposition that, insofar as retroactive payments are concerned, this is in truth a suit against the State of New York to which it has never consented. We conclude that this point is well taken.

• • •

It is not pretended that these payments are to come from the personal resources of appellants. Appellees expressly contemplate that they will, rather, involve substantial expenditures from the public funds of the state. It is equally a part of the lore of the Eleventh Amendment that, even though a state may not be named as a party defendant, any judgment declaring a liability which must be met from the public funds of the state does come within the reach of the Eleventh Amendment; and a court will, absent the state's consent, be deemed without jurisdiction to enter such a judgment. *Ford Motor Company* v. *Department of Treasury of Indiana*, 323 U.S. 459, 463-464, 65 S.Ct. 347, 89 L.Ed. 389 (1945).

It is one thing to tell the Commissioner of Social Services that he must comply with the federal standards for the future if the state is to have the benefit of federal funds in the programs he administers. It is quite another thing to order the Commissioner to use state funds to make reparation for the past. The latter would appear to us to fall afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force.

What all this suggests is that the Supreme Court has not yet come to grips with the problem of retroactive public assistance payments as a remedy which federal courts either can or should order to be made.

What is clear is that declaratory and injunctive relief can be granted against state officials which prohibit the continued enforcement of state welfare statutes or in keeping with standards deriving from federal statutes. An unconstitutional state practice or plan could not be continued by the state even if it were willing to forego federal financial help, although even in such case the existence of federal jurisdiction to require retroactive payments would be dubious at best—a situation which, of course, we do not have here. Contrarily, state welfare administration which is invalid only in the sense that it does not conform to federal standards may be continued, federal court injunction notwithstanding, if the state is willing to bear its entire cost.

In the light of these propositions—which are about the only certainties we discern in this complex and confused area of the law—we believe ourselves, insofar as the Supreme Court is concerned, to be free to assert that, first, we not consider it an appropriate exercise of federal equity jurisdiction for the District Court to compel New York to devote its funds to retroactive payments, and, second, even if the action taken by the District Court be deemed to be in keeping with the framework of federal-state relationships in the case of grants-in-aid for the welfare programs, the Eleventh Amendment stands in the way.

In *Rothstein* the Court additionally found it an inappropriate exercise of federal equity jurisdiction to order the retroactive payment of public assistance benefits in view of the statutory scheme embodying the concept of cooperative federalism. With respect to that issue, the New York welfare agency contended that retroactive payments would go to persons no longer on welfare rolls, hence preventing already inadequate state funds from being channeled to persons whose needs were immediate and urgent. Particularly, the special incremental value

of money to persons living at subsistence levels was noted, but, at the same time, it was observed that it was not certain that persons from whom funds were withheld in 1969 had a present compelling need for them, or that it was provident, giving existing deprivations that might be relieved, to order the expenditure of scarce funds as compensation for past suffering, which, however deplorable, could not be undone.

The inappropriateness of retroactive payments, however, was based on federal policy established in Congressional welfare legislation. The court observed that the only remedy provided by Congress for statutory and regulatory violations and, as a consequence, for protecting the federal treasury was a prospective cut-off of funds. Congress clearly was sensitive to the potential for serious strain on the federal structure inherent in a grant program of great magnitude and complexity. The Court, therefore, declared that states, through the incentive of matching grants, were to be encouraged to make generous use of their funds to aid their impoverished citizens; however, they were not to be deprived of their freedom to ultimately determine whether, and how, state funds were to be spent. Absent explicit directions from Congress to the contrary, it was not thought that federal interest in retroactively correcting the misuse of federal funds—the only federal policy applicable to this case could by itself justify the significant increase in state tensions that would result inevitably from a court order requiring the state to expend its funds against its will. It was further noted that there was no bad faith on the part of the State.

It is respectfully submitted that the Second Circuit Court was correct in its conclusion that the cut-off of federal funds is the only remedy provided in the Social Security Administration Act to welfare recipients. Clearly, Con-

gress never permitted nor did it intend the requirement of retroactive assistance to be a remedy for noncompliance with the Social Security Administration Act. This fact is also borne out by this Court's decision in *Rosado* v. *Wyman*, 397 U.S. 397 (1970). In that case, this Court stated (397 U.S. 397 at 421-2)

> . . . we remand the case to the District Court to fix a date that will afford New York an opportunity to revise its program in accordance with the requirements of § 402(a)(23) if the State wishes to do so.
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> • • •
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> . . . or, should New York choose not to submit a revamped program by the determined dote, issue its order restraining the further use of federal monies pursuant to the present statute.

The United States District for the Southern District of New York on remand in *Rosado, supra,* interpreted that decision as precluding the ordering of retroactive assistance (322 F. Supp. 1173, 1195-6):

> Plaintiffs seek to invoke the equity powers of this Court to grant plaintiffs and other members of their class the amounts they would have received, over and above what they actually did receive, if the State's AFDC payment schedules had been in compliance with section 402 since July 1, 1969. Under the mandate of the Supreme Court, this Court lacks power to grant such relief.
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> Concern over the strong implications for federalism implicit in congressional decisions to encourage state administered AFDC programs undoubtedly motivated the Supreme Court to emphasize that the State was to be given a choice.
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> Supporting this conclusion is the fact that the Supreme Court afforded the State time to revise its

program before the district court was empowered to consider a restraint on the further use of federal money in the State AFDC program. *Rosado* v. *Wyman*, (397 U.S. 397, 421-422, 90 S. Ct. 1207, 1222, 25 L.Ed. 2d 442, 1970). If a remedy for underpayments had, in a sense, vested, this limitation on the district court's power would have been inappropriate.

The denial of a substantial retroactive money award in *Rosado* was not appealed by plaintiff.

The denial of certiorari in *Rothstein* v. *Wyman*, Case No. 72-5831, and this Court's opinion in *Rosado* v. *Wyman*, *supra*, give strong support to the conclusion that there are both constitutional and federal statutory bars to retroactive money awards being granted to welfare recipients.

However, both the Seventh Circuit Court of Appeals and the respondent characterize the payment of retroactive awards as equitable restitution so as to escape the consequences of the Federal preclusions. It is submitted that the characterization of monetary awards as equitable restitution is improper. It is an elementary principle of equity jurisprudence that the court will look to the substance of a particular transaction as opposed to its form in determining its consequences. *Young* v. *Higbee*, 324 U.S. 204 (1944); *Bromley* v. *McCaughn*, 280 U.S. 124 (1929). In this respect, the true nature of a retroactive money award against the state will not be changed by pinning on it the label of equitable restitution. Basic doctrines of constitutional law cannot be avoided by so easy a device.

It was urged, nevertheless, by the respondents that their right to relief is based on a federal cause of action. The petitioners demonstrated that this federal cause of action cannot be statutory in nature since there is no such remedy as "retroactive assistance" provided in the Social

Security Act. Hence, the theory of equitable restitution must find its basis upon an alleged federal common law cause of action. However, plaintiffs do not fulfill the conditions precedent for the application of equitable restitution, even under the common law. The establishment of unjust enrichment is an indispensable prerequisite for a claimant to entitle him to equitable restitution. See *Rankin* v. *Emigh*, 218 U.S. 27, 54 L.Ed. 915 at 1921 (1910). See also, Restatement of Restitution, Sections 1, 3, 107, and Comment B.

It is respectfully submitted that, as a matter of law, there has been no unjust enrichment of the Illinois Department of Public Aid, the body politic, or the taxpayers of the State of Illinois under the facts and circumstances involved in this case. In each of the past several years, the Illinois General Assembly has been asked to enact an emergency deficit appropriation to meet the needs of welfare recipients under the Categorical Assistance Programs. Accordingly, every dollar appropriated has been paid to the class of welfare recipients now before this Court. The body politic has not retained an extra dollar of the AFDC appropriation; it has not turned back any funds to the Illinois General Assembly; and the taxpayers have not had any of their taxes reduced thereby.

If there is to be an unjust enrichment as a result of the facts and circumstances of this appeal, it is the welfare recipients themselves who will be unjustly enriched. It is undisputed that some of the members of the class of welfare recipients now before this Court are no longer on welfare, and hence, do not qualify for assistance today. Nevertheless they will receive assistance today should they prevail in this case.

Hence, the doctrine of equitable restitution has no application to the present facts and circumstances, and, there-

fore, the relief sought by the plaintiffs is substantively a retroactive money award dischargeable from the General Revenue Fund of the State.

UNDER STANDARDS ENUNCIATED BY THIS COURT FOR DETERMINING THE EFFECT TO BE GIVEN A JUDGMENT, THE FACTS IN THE INSTANT CASE MANDATE PROSPECTIVE APPLICATION ONLY.

This Court has established that the Federal Constitution neither precludes nor compels the prospective application of a court's decision in either a civil or a criminal case. *Chevron Oil Co.* v. *Hudson*, 404 U.S. 97, 30 L.ed. 2d 296, 92 S.Ct. 349 (1971); *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *Great Northern Railway* v. *Sunburst Oil and Refining Co.*, 287 U.S. 358 (1932). Until recently courts had been given unfettered discretion in deciding what standards should govern prospective application, and as a result have arrived at varied conclusions. Compare, e.g., *United States* v. *Scotts*, 425 F.2d 55 (9th Cir. 1970) with *United States* v. *Scardino*, 414 F.2d 925 (5th Cir. 1969), and *Bryson* v. *Burson*, 308 F. Supp. 1170 (N.D. Ga. 1969) with *Machado* v. *Hackney*, 299 F. Supp. 644 (W.D. Tex. 1969).

This Court, however, has established certain standards for determining whether new rulings should be applied prospectively or retroactively. In *Linkletter* v. *Walker*, 381 U.S. 618 at 627, it was said that "we must look to the purpose of the [new] rule; the reliance placed on the [overruled] doctrine; and the effect on the administration of justice of a retrospective application of [the new rule] . . ." This Court also stated that no distinction is to be drawn between civil and criminal cases when determining retroactivity. 381 U.S. at 627. In *Chevron Oil Co.* v.

Hudson, 404 U.S. 97 at 106, 107, 30 L.ed. 2d 296 at 306, 92 S.Ct. 349 at 352, this Court reaffirmed the three-part *Linkletter* test in the civil area:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, e.g., Hanover Shoe v. United Shoe Machinery Corp., supra, at 496, 20 L.Ed. 2d at 1243, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., Allen v. State Board of Elections, supra, at 572, 22 L.Ed. 2d at 20. Second, it has been stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Linkletter v. Walker, supra, at 629, 14 L.Ed. 2d at 608. Finally, we have weighed the inequity imposed by retroactive application, for "[W]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity". Cipriano v. City of Houma, supra, at 706, 23 L.Ed. 2d at 652.

This Court most recently applied these standards in *Lemon* v. *Kurtzman*, 41 Lw. Wk. 4467 (Doc. No. 71-1470, decided April 3, 1973) (hereafter for convenience sake referred to as Lemon II). In *Lemon II* the Court held that an unconstitutional statute is not absolutely void, but is a practical reality upon which parties may rely, and that courts recognize this reality.

Indeed, an analogy can be drawn between the facts of the *Lemon* case and the present case. In *Lemon* a statute was found to be unconstitutional on its face. In this case,

the plaintiff alleged that certain Illinois Department of Public Aid regulations were not in conformity with corresponding grant in AFD regulations of the United States Department of Health, Education and Welfare, and hence contravened the Supremacy of the Laws Clause of the United States Constitution.

In *Lemon* this Court had held on June 20, 1971, that the Pennsylvania statutory program to reimburse nonpublic sectarian schools for certain secular educational services violated the Establishment Clause of the First Amendment. Thereafter, the case was remanded to the Three-Judge District Court for further proceedings consistent with the Court's opinion in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) (Hereinafter referred to as Lemon I) On remand, the District Court entered summary judgment in favor of the appellants and enjoined payment of any state funds to non-public sectarian schools for educational services performed after June 28, 1971. The District Court's order, however, permitted the State to reimburse nonpublic schools for services provided before the Supreme Court's decisions in *Lemmon I*.

In finding that the parochial schools had a right to rely upon the unconstitutional statute, Chief Justice Burger in *Lemon II* declared:

> It is well established that reliance interests weigh heavily in the shaping of an appropriate equitable remedy. *City of Phoenix* v. *Kolodziejski*, supra; *Cipriano* v. *City of Houma; Allen* v. *Board of Elections, supra*. . . . (41 L.W. 4471)
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> It is argued, though, that the schools were foolhardy to rely on any reimbursement by the state whatever, in view of the constitutional cloud over the Pennsylvania program from the outset. We conclude, however, that our holding in Lemon "decid[ed] an issue of first impression whose resolution was not clearly

foreshadowed." *Chevron Oil Company* v. *Huson*, supra, 404 U.S. at 106. A Three-Judge District Court, with one dissent, upheld Act 109. Soon after, another Three-Judge District Court in Rhode Island held unconstitutional the Rhode Island statutory scheme we considered together with Pennsylvania's program in "Lemon I." Nor were the District Courts alone in disagreement over the constitutionality of Lemon-style plans to provide financial assistance to sectarian schools. This court was itself divided when the issue was ultimately resolved after full briefing and argument. And the court acknowledged, "that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." "Lemon I," supra, 403 U.S. at 612.

That there would be a constitutional attack on Act 109 was plain from the outset. But this is not a case where it could be said that Appellees acted in bad faith or that they relied on a plainly unlawful statute. In this case, even the clarity of hindsight is not persuasive that the constitutional resolution of "Lemon I" could be predicted with assurance sufficient to undermine Appellees' reliance on Act. 109.

In the end, then, Appellants' position comes down to this: That any reliance whatever by the schools was unjustified because Act 109 was "an untested" state statute whose validity had never been authoritatively determined. The short answer to this argument is that government must act if they are to fulfill their high responsibilities.

This petition for writ of certiorari is not unlike the *Lemon* case regarding retroactive application of a decision. The District Court found that the Illinois Department of Public Aid's regulations did not fulfill the conditions and requirements of the Social Security Act. At the time of the law suit the decision of the District Court was not clearly foreshadowed. Unless there can be a showing

made that the Illinois Department of Public Aid acted in bad faith, the District Court and the Seventh Circuit Court of Appeals erred in ordering a retroactive money award.

FEDERAL REGULATIONS RELIED UPON BY PLAINTIFF ARE INCONSISTENT WITH THE APPLICABLE PROVISIONS OF THE SOCIAL SECURITY ACT AND ARE THEREFORE INVALID.

Plaintiff relies upon the requirements set forth in the Federal Handbook of Public Assistance Administration, Part IV, which provides in pertinent parts as follows:

> 2200 Requirements for State Plans. A State Plan for OAA, AFDC, AB, APTD, or AABD must provide that:
>
> (3) Prompt action will be taken on each application within reasonable state established time standards (which effective July 1, 1968, will not exceed 30 days).

In February of this year 45 C.F.R. Section 206.10 was promulgated, which provides:

> (a) *State Plan Requirements.* A State Plan under Title, I, IV-A, X, XIV, or XIX of the Social Security Act must provides that
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> • • •
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> (3) A decision will be made promptly on applications, pursuant to reasonable state-established time standards not in excess of 30 days of OAA, AFDC, and AB (and in AABD and MA as to the aged and blind) and 60 days in APTD (and AABD and MA as to the disabled).
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> (5) Financial assistance and medical care and services included in the plan will be furnished promptly to eligible individuals without delay attributable to the agency's administrative process, and will be continued regularly to all eligible individuals until they are found to be ineligible.
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> • • •

(6) Entitlement will begin as specified in the State plan, which (i) for financial assistance must be no later than the date of authorization of payment and, for purposes of Federal financial participation, may be as early as the first of the month in which an application has been received and the individual meets all the eligibility conditions.

The Social Security Act, 42 U.S.C. Sections 302 (a)(4), 602 (a)(4), 1202 (a)(4), 1352(a)(4), 1382(a)(4), provides only for a hearing to any individual where a claim is not acted upon "with reasonable promptness". The establishment of arbitrary thirty and sixty day maximums in the HEW regulations for determination of eligibility and initiation of payments without taking into consideration the efficient administration of the Act by the State agencies is inconsistent with the "reasonable promptness" requirement and must therefore be declared unlawful as being an abuse of the rule-making authority granted to the Secretary of HEW under Section 1302 of the Social Security Act.[3]

This Court has expressed the governing principle for rules which attempt to extend or modify a statute. "If experience shows that Congress acted under a mistaken impression, that does not authorize the . . . Department . . . to make new laws which they imagined Congress would have made had it been properly informed." *Merritt* v. *Welsh*, 104 U.S. 694, 704 (1882). In a Second

[3] 42 U.S.C. Section 1302 reads as follows:

"The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health, Education and Welfare, respectively, shall make and publish such rules and regulations, *not inconsistent with this Chapter*, as may be necessary to the efficient administration of the function with which each is charged under this chapter."

Circuit case, the standard for testing the validity of an HEW regulation specifically was said to be whether the regulation was "unreasonable" and "contrary to the act." *Connecticut State Department of Public Welfare* v. *Department of HEW*, 448 F.2d 209, 213 (2nd Cir. 1971). See also *Bingham's Trust* v. *Commissioner of Internal Revenue*, 325 U.S. 365 (1945); *Campbell* v. *Galeno Chemical Co.*, 281 U.S. 599 (1930); *Waite* v. *Macy*, 246 U.S. 606, 608 (1918); *Almenares* v. *Wyman*, 344 F. Supp. 512 (S.D. N.Y. 1971).

A Wisconsin state court decision offers an analogy to the case at hand. In *Wisconsin Bridge and Iron Co.* v. *Industrial Commission*, 268 Wis. 314, 67 N.W. 2d 378 (1954), the Supreme Court of Wisconsin considered a statute which provided that an employer should furnish and use safety devices and safeguards "reasonably adequate to render such employment and places of employment safe." 67 N.W. 2d at 379. A rule of the Industrial Commission placed an absolute duty on employers to prohibit employees from working on any slippery platform until it had been sprinkled with sand or otherwise made non-slippery. The rule contained no "reasonableness" provision; nor was there any reference to the nature of the work or the place of the employment as considerations in rendering floor surfaces non-slippery. The rule was therefore declared "invalid as imposing upon an employer a greater duty than was imposed by statute to provide a place of employment as free from danger to his employees as the nature of the employment and the place of employment would reasonably permit." Id. at 380.

Application of this principle to the case at hand is apparent. Here, the Secretary has imposed requirements

far beyond those required by statute. The Social Security Act requires only that the hearing be held if an application is not acted upon with "reasonable promptness". The regulations, however, set 30 and 60-day limits for final determination of eligibility and initiation of payments. Such a requirement greatly extends the intent of Congress and goes far beyond the permissible scope of the statute.

There exists no legislative history explaining what Congress meant by the term "reasonable promptness." Nor has the phrase been defined by the court specifically with respect to the Social Security Act, although a number of cases have dealt with similar statutory requirements. Thus, the term "prompt" has been construed to mean acting with proper diligence or within a reasonable time. *Bowles* v. *Mutual Benefit Health & Accident Association,* 99 F. 2d 44 (4th Cir. 1938); *Chapman* v. *Telex, Inc.,* 129 F.Supp. 567 (N.D. Ga. 1954). The party involved should proceed with that speed which the nature of the case and the surrounding circumstances require. *Jordy* v. *Dunliere,* 77 S.E. 162 (Ga. 1913).

One District Court did deal with Section 602 of the Social Security Act prior to the passage of the regulation in question. In *Cooper* v. *Laupheimer,* 316 F. Supp. 264 (E.D. Pa. 1970), the court simply held that by accepting federal funds a state assumes a duty that aid shall be furnished with reasonable promptness to all eligible individuals.

Imposition of rigid 30 and 60-day requirements under the guide of the "reasonable promptness" rubric for a final determination as to welfare eligibility and the initiation of welfare payments is arbitrary and unreasonable and must therefore be struck down. See, e.g.,

Illinois Steel Co. v. *Baltimore & Ohio R.R. Co.*, 320 U.S. 508 (1944); *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U.S. 129 (1936).

To be sure, the views of agencies entrusted with the administration of a statute are to be given due deference when issues of statutory interpretation arise. See generally, Annot., *Administrative or Practical Construction of Statute as Precedent for Judicial Construction*, 84 L.Ed. 28 (1939). Nevertheless, the attitudes, practices and interpretations of an administrative agency are certainly not absolute rules of law but, at best, merely "helpful guides to aid courts in their task of statutory construction." *Sims* v. *United States*, 252 F.2d 434, 438 (4th Cir. 1958), aff'd 359 U.S. 108 (1959). The ultimate authorities on issues of statutory interpretations are the courts (*Volkswagenwerk* v. *FMC*, 390 U.S. 261, 272 (1968)), which have the final responsibility to declare what a statute means (*Fishgold* v. *Sullivan Drydock & Repair Corp.*, 154 F.2d 785, 790 (2nd Cir.) (L. Hand. J.), aff'd. 328 U.S. 275 (1946)). To the same effect, see e.g., *Folsom* v. *Pearsall*, 245 F. 2d 562, 564-565 (9th Cir. 1957); *Commissioner of Internal Revenue* v. *Winslow*, 113 F. 2d 418, 423 (1st Cir. 1940). Where a conflict arises between the administrative and judicial construction of a statute, the latter will necessarily prevail. *Deeg* v. *Lumbermen's Mut. Cas. Co.*, 279 F. 2d 491, 494 (10th Cir. 1960); *Woods* v. *Benson Hotel Corp.*, 177 F. 2d 543, 546 (8th Cir. 1949); *Williams* v. *Dandridge*, 297 F. Supp. 450, 460-462 (D.Md. 1968), rev'd on other grounds, 397 U.S. 451 (1970), and cases cited therein. See K. Davis, *Administrative Law Treatise, Section* 5.06, pp. 326-328 (1958). In determining the proper weight to be accorded to an administrative decision, account must be taken of the consistency of the agency's interpretation with the underlying purposes of

the statute which is being construed. *P. Lorillard Co.* v. *FTC,* 267 F. 2d 439, 443 (3rd Cir.), cert. den., 361 U.S. 923 (1959). In no event is a court "compelled to follow an administrative interpretation that it regards as inconsistent with the legislative purpose of the provision in issue." *In re Petition of Chin Thloot Har Wong,* 224 F. Supp. 155, 165 (S.D. N.Y. 1963). If the agency's construction has resulted from an uncontested nonadversary proceeding, it has been said that the agency's interpretation is entitled to "relatively little weight." *SEC* v. *Sterling Precision Corp.,* 393 F. 2d 214, 220 (2nd Cir. 1968). See, *Fishgold* v. *Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 290 (1946). Nor is an administrative agency permitted, in effect, to amend a congressional statute by imposing requirements, such as HEW has attempted to do with its 30 and 60-day rules, which are not authorized by the statute conferring rule-making power on the agency. See, e.g., *State of Arizona* v. *Richardson,* No. CIV 71-563 (D. Ariz., June 16, 1972).

The number of people receiving welfare benefits in the State of Illinois has grown from 424,665 in February 1967 to approximately 983,600 at the present time. In 1971 397,298 new recipients were added to the welfare rolls. The time required to place these individuals on the welfare lists renders a thirty-day requirement unreasonable. Congress recognized the burden of administering the welfare program when it merely required that benefits be commenced with "reasonable promptness." The State of Illinois attempts to meet that standard; a thirty-day requirement, however, is admintstratively unreasonable and therefore operates in derogation of the Social Security Act.

The annual cost of welfare in Illinois for the fiscal year 1972 was $1,018,078,753. Placing a thirty-day requirement

on determination of eligibility will hamper effective investigation of potential applicants and will increase the number of fraudulent claimants eventually receiving benefits. The cost to the State and to the Federal government is potentially very high.

Defendant, therefore, respectfully submits that the rigid thirty-day and sixty-day time limits of the HEW regulations for final determination for eligibility for welfare benefits are administratively unreasonable, unsound, and arbitrary, are inconsistent with the provisions of the Social Security Act which simply require "reasonable promptness" in making such determinations, and should consequently be declared unlawful as an unauthorized exercise of HEW's rule-making authority.

CONCLUSION

For all these reasons, it is respectfully asked that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the Seventh Circuit.

Respectfully submitted,

WILLIAM J. SCOTT
Attorney General of the State of Illinois
160 North LaSalle Street
Chicago, Illinois
312-793-2500

DONALD S. CARNOW
Special Assistant Attorney General
300 West Washington Boulevard
Chicago, Illinois 60606
312-782-3967

APPENDIX A

In the United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1972 — SEPTEMBER SESSION, 1972

Nos. 72-1380, 72-1381

JOHN JORDAN, by his next friend, JEANETTE BRYANT, individually and on behalf of all other persons similarly situated,
Plaintiffs-Appellants, Cross-Appellees,

v.

EDWARD T. WEAVER, *et al.*,
Defendants-Appellees, Cross-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 71 C 70

ALEXANDER J. NAPOLI, *Judge.*

ARGUED OCTOBER 20, 1972 — DECIDED JANUARY 18, 1973

Before HASTINGS, *Senior Circuit Judge,* CUMMINGS, *Circuit Judge,* and GORDON, *District Judge.*[1]

CUMMINGS, *Circuit Judge.* This class suit was brought to challenge actions of Illinois and Cook County officials in administering the federal-state program of Aid to the Aged, Blind and Disabled ("AABD") under 42 U.S.C. §§ 1381-1385. Count I of the amended complaint alleged that defendants, acting pursuant to Section 4004.1 of the Categorical Assistance Manual of the Illinois Department

[1] District Judge Myron L. Gordon of the Eastern District of Wisconsin is sitting by designation.

of Public Aid,[2] were not complying with federal regulations requiring that eligibility determinations on applications for assistance for the aged and blind under AABD be made within 30 days and for the disabled within 60 days (formerly 45 days) and requiring that those found eligible receive their assistance within the respective maximum time periods.[3] Plaintiffs further charged that defendants improperly authorized grants to commence only with the month in which an application was approved and not including prior eligibility months for which an applicant was entitled to aid under federal law.[4] Count II alleged that the Fourteenth Amendment, the applicable federal and Illinois statutes, and the federal regulations

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[2] That Section provides in pertinent part:
"Except for DA and MA-NG(D) cases which have a time standard of 45 days, the time standard for disposition of applications is 30 days *from the date the applicants are determined eligible and the effective date of their first assistance* or are determined ineligible and receive a notice of denial of assistance * * *." (Emphasis supplied.)

[3] See 45 C.F.R. § 206.10(3), which provides in pertinent part:
"A decision will be made promptly on applications, pursuant to reasonable State-established time standards not in excess of 30 days for OAA, AFDC, and AB (and in AABD and MA as to the aged and blind) and 60 days in APTD (and in AABD and MA as to the disabled). Under this requirement the applicant is informed of the agency's time standard in acting on applications, *which covers the time from date of application to the date that the assistance check*, or notification of denial of assistance or change of award, or the eligibility decision with respect to medical assistance, *is mailed to the applicant or recipient*." (Emphasis supplied.)
and 45 C.F.R. § 206.10(6), which provides, *inter alia*:
"Entitlement will begin as specified in the State plan, which (i) for financial assistance must be no later than the date of authorization of payment * * *."
The longer time period for the disabled is to permit a medical determination of their disability.

[4] 42 U.S.C. § 1382(a)(8); 45 C.F.R. § 206.10(3) and (6).
At all times pertinent to this case, Section 8255.1 of the Categorical Assistance Manual of the Illinois Department of Public Aid provided that a new assistance grant may be authorized for the month in which the application was approved but not (with certain exceptions) for any prior period. Thus where eligibility was determined subsequent to the 30-day and 60-day time periods mandated by federal regulations, an applicant might not receive assistance retroactive to the 30th or 60th day. Such was the case of the named plaintiff who applied for disability assistance on September 18, 1970, but who received aid starting only with the month of January since that was the month in which his application was approved. See *Rodriquez v. Swank*, 318 F.Supp. 289, 292-293 (N.D. Ill. 1970), affirmed, 403 U.S. 901. A new Illinois Department of Public Aid regulation, Section 8111 of the Categorical Assistance Manual, provides that when a determination of eligibility is not made within the 30-day or 60-day periods "assistance is to be retroactive

require that AABD applicants who meet the eligibility conditions on the date of application must receive assistance effective from that date.

The district court declared Section 4004 (and subsections thereunder) of the Illinois Categorical Assistance Manual invalid insofar as it was at variance with 42 C.F.R. § 206.10(3) and granted a permanent injunction requiring compliance with the federal time limits for processing and paying AABD applicants, except in certain exemplified unusual circumstances, and retroactively requiring defendants to release AABD benefits withheld from those whose applications, commencing on July 1, 1968, to April 16, 1971,[5] had not been processed within the federal time limits. A stay pending appeal was granted as to the latter requirement. The court also held that eligible AABD applicants are not entitled to assistance from the date of application and denied plaintiff's prayer for punitive damages against a former Director of the Illinois Department of Public Aid. Defendants appeal from the district court's decision on the grounds that plaintiff's suit for retroactive welfare benefits may not be maintained in federal court because barred by the Eleventh Amendment, that the judgment of inconsistency between the federal regulations and the provisions of the Illinois Categorical Assistance Manual can be given prospective effect only, and that the federal regulations in question are inconsistent with the Social Security Act. Plaintiffs appeal from that decision insofar as it held them not entitled to receive benefits from the date of their

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[4] (Continued)
to the 30th or 60th day from the date of application, providing the applicant was eligible for that period." However, whereas Section 8255.1 made assistance effective from the first of the month in which eligibility was determined, Section 8111 provides "[T]he period for which needs may be met by initial authorization begins with the date of decision and authorization action by the caseworker." Hence in a case in which the caseworker acts within the appropriate deadline, Section 8111 may defer the effective date of initial assistance beyond what Section 8255.1 would have provided. But see 45 C.F.R. § 206.10(6).

[5] July 1, 1968, is the effective date of the federal regulations prescribing maximum permissible time standards for processing AABD applications, and April 16, 1971, is the date of the preliminary injunction herein. Under the judgment below, benefits were to be released retroactive to the appropriate time limits.

applications and insofar as it failed to award the requested punitive damages.

Eleventh Amendment Defense

Defendants' principal argument is that the Eleventh Amendment or the sovereign immunity doctrine bars an action against the Director of the Illinois Department of Public Aid for retroactive welfare AABD payments. Significantly, defendants do not rely on the Eleventh Amendment or sovereign immunity with respect to the expenditure of state funds resulting from other portions of the judgment below. We conclude the argument must fail.

First of all, in four different three-judge court decisions which rejected the identical Eleventh Amendment argument defendants advance here, appeals were taken to the Supreme Court specifically raising the point. The Supreme Court affirmed each case. *Sterrett* v. *Mothers & Childrens Rights Organization*, ... U.S. ....., 41 U.S.L.W. 3182 (October 10, 1972), affirming unreported order and judgment, N.D. Ind. April 14, 1972, on remand from *Carpenter* v. *Sterrett*, 405 U.S. 971; *State Dep't of Health and Rehabilitative Services* v. *Zarate*, 407 U.S. 918, affirming unreported decision, S.D. Fla. Sept. 29, 1971, January 20, 1972; *Wyman* v. *Bowens*, 397 U.S. 49, affirming *Gaddis* v. *Wyman*, 304 F. Supp. 717, order at CCH Pov. L. Rptr. Transfer Binder ¶ 10,506 (S.D. N.Y. 1969); *Shapiro* v. *Thompson*, 394 U.S. 618, affirming 270 F.Supp. 331 (D. Conn. 1967).[6] Although two of the affirmances

[6] In *Rothstein* v. *Wyman*, 467 F.2d 226 (2d Cir. 1972), the Second Circuit did not have before it the Supreme Court's summary affirmances in *Sterrett* v. *Mothers & Childrens Rights Organizations*, *supra*, and *State Dep't of Health and Rehabilitative Services* v. *Zarate*, *supra*. The former decision came down after the September 7, 1972, decision of the Second Circuit in *Rothstein*; although the latter had already been rendered, it apparently escaped the Second Circuit's attention. The Second Circuit dismissed the *Wyman* v. *Bowens*, *supra*, affirmance on the ground that the district court's opinion, reported at 304 F.Supp. 717, "recites the court's purpose to enjoin the defendants from enforcing the state statute but says nothing about the remedy of retroactive payments to persons denied assistance prior to the invalidation of the statute." 467 F.2d at 239. However, the order entered following the opinion grants exactly such a remedy, CCH Pov. L. Rptr., Transfer Binder ¶ 10,506 at 11,402-11,403 (October 10, 1969), and the jurisdictional statement in the Supreme Court raised the issue of the propriety of such

were summary, and the other two at least the equivalent, (in *Shapiro* the Supreme Court affirmed without commenting on the issue, and *Wyman* was a per curiam affirmance on the authority of *Shapiro*), a summary affirmance is a decision on the merits having precedential value. *E.g.*, *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *United States*, 400 U.S. 932, 935 (Justice White dissenting from the summary affirmance); *Barton* v. *Sentner*, 353 U.S. 963 (Justices Burton and Clark dissenting from the summary affirmance). See Stern and Gressman, Supreme Court Practice 197 (4th ed. 1969). Therefore, we conclude that the aforementioned Supreme Court affirmances foreclose the sovereign immunity or Eleventh Amendment argument defendants press here.

Secondly, even if an independent analysis were open to us, we would hold the defendants' contentions to be without merit. We recognize the Second Circuit came to a contrary conclusion in *Rothstein* v. *Wyman*, 467 F.2d 226 (2d Cir. 1972), but are unpersuaded by its reasoning.[7]

The Eleventh Amendment reads as follows:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any foreign State."

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[6] (Continued)
relief and argued such relief "was an incursion on the Eleventh Amendment." p. 18. With respect to *Shapiro*, *supra*, the Second Circuit acknowledged that the jurisdictional statement in that case raised the Eleventh Amendment issue, but somehow thought that the Supreme Court's affirmance of the district court's judgment awarding the plaintiffs monies unconstitutionally withheld was meaningless because the Supreme Court did not comment on the issue and because two other district court decisions disposed of in the same opinion did not involve that issue. 467 F.2d at 239, 239-240 n. 9. We are of the opinion that the *Shapiro* decision must be considered at least the equivalent of a summary affirmance of the district court's decision on the Eleventh Amendment point. See 270 F.Supp. at 338, n. 5.

[7] Defendants also rely on *Westberry* v. *Fisher*, 309 F.Supp. 12 (D. Me. 1970) and *Francis* v. *Davidson*, 340 F.Supp. 351 (D. Md. 1972), which adopts the holding in *Westberry*. However, *Westberry* appears to have been overruled *sub silentio* in *Stoddard* v. *Fisher*, 330 F.Supp. 586 (D. Me. 1971), insofar as it held the plaintiffs were not entitled to illegally withheld benefits.

Taken literally, this amendment does not bar suits by Illinois citizens against Illinois or its officials. However, in 1890 the Supreme Court decided that suits against a state by citizens of the same state could likewise not be maintained in federal courts. *Hans* v. *Louisiana*, 134 U.S. 1. Whether the holding amounted to a liberal extension of the amendment or a statement of the common law of sovereign immunity is unclear, although the decision was bottomed on the concept of sovereign immunity, which found constitutional embodiment in the Eleventh Amendment.[8] For our purposes it is unnecessary to decide whether the asserted defense of immunity from suit is of constitutional stature, although we recognize that a waiver of this immunity may more readily be found if it is not.[9]

It is conceded that under the doctrine of *Ex parte Young*, 209 U.S. 123, the Eleventh Amendment or sovereign immunity is no bar to a federal court's ordering state welfare officials to bring their conduct into conformity with federal law.[10] Defendants argue, however, and the Second Circuit held, that this doctrine falls short of allowing a federal court to order these officials "to use state funds to make reparation for the past." 467 F.2d at 237. It is said that "It is * * * a part of the lore of the Eleventh Amendment that, even though a state may not be named as a party defendant, any judgment declaring a liability which must be met from the public funds of the state does come within the reach of the Eleventh

[8] See generally Note, *Private Suits Against States in the Federal Courts*, 33 U. Chi. L. Rev. 331 (1966). Compare *Ex parte Young*, 209 U.S. 123, 150; *Chandler* v. *Dix*, 194 U.S. 590, 591; *Ford Motor Co.* v. *Department of Treasury of Ind.*, 323 U.S. 459, 464; *United States* v. *Mississippi*, 380 U.S. 128, 140; with *Ex parte New York*, 256 U.S. 490, 497; *Parden* v. *Terminal R. Co.*, 377 U.S. 184, 186, 192.

[9] See Note, *supra* note 8.

[10] In *Ex parte Young*, 209 U.S. 123, 159, the Supreme Court surmounted the Eleventh Amendment objection by resorting to the fiction that when a state official seeks to enforce state law which conflicts with paramount federal law, "he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." See Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. Chi. L. Rev. 435, 437 (1968). Of course, there is nothing inherent in this fiction which precludes its utilization to allow equitable relief other than an injunction against future conduct. The state official can be said to be "stripped of his official or representative character" when ordered to pay out benefits he withheld in violation of federal law.

Amendment * * *." 467 F.2d at 236. But of course the injunctions conceded to be authorized by *Ex parte Young, supra,* certainly operate as liabilities upon the state treasury. Even before *Ex parte Young* it was recognized that relief which was appropriate notwithstanding the Eleventh Amendment would to varying degrees act directly on the property of the state. *Osborn* v. *The Bank,* 22 U.S. (9 Wheat.) 738, 853. Mandatory injunctions granted on the authority of *Ex parte Young* have certainly had an impact on the state treasury by requiring the expenditure of public funds. See, *e.g., Graham* v. *Richardson,* 403 U.S. 365; *Goldberg* v. *Kelly,* 397 U.S. 254; *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218; *Jackson* v. *Ogilvie,* 426 F.2d 1333 (7th Cir.), certiorari denied, 400 U.S. 833 (1970). Here the district court's permanent injunction requiring compliance with the federal time limits for processing and paying AABD applicants reaches into the state treasury and requires the expenditure of more monies than the state was spending under the practices found unlawful. In fact, that part of the judgment requires the expenditure of more monies than the seriously disputed part of the judgment requiring the payment of wrongfully withheld benefits! Whether a liability is declared which must be met from the state's public funds is not the touchstone of the Eleventh Amendment's applicability.

It is said in *Rothstein* that *Ex parte Young* allows only "prospective" relief and it is apparently assumed that the date of the district court's decision is the crucial one for determining prospectivity. 467 F.2d 236-237. (See note 11, *infra.*) In *Ex parte Young* the Minnesota legislature had set allegedly confiscatory railroad rates, and in an effort to make a test of the legality of the rates impracticable made issuance of any ticket above the rate a crime punishable by an enormous fine or lengthy imprisonment or both. This scheme was alleged to violate equal protection and due process. On the eve of the effective date of the legislation, petitioners applied for and received a federal court injunction against the state Attorney General forbidding him to enforce the statute. The Supreme Court held the district court could properly grant the early injunction applied for notwithstanding

the Eleventh Amendment upon finding the enactment unconstitutional. To be sure, in the posture of *Ex parte Young*, in the district court, the injunction prayed for was completely adequate equitable relief. The validity of that injunction, which the State Attorney General disobeyed, was the issue before the Supreme Court. There is nothing in *Ex parte Young* which delimits the relief a district court can give notwithstanding the Eleventh Amendment in a case which comes before it in a different posture. In fact, it appears that the Court in *Ex parte Young* was well aware that permissible relief might take a form other than a prospective injunction, for it phrased the question before it generally as "whether there is a remedy that the parties interested may resort to, by going into a Federal court of equity, in a case involving a violation of the Federal Constitution • • •" 209 U.S. at 149. Even before *Ex parte Young*, in *Osborn* v. *The Bank*, 22 U.S. (9 Wheat.) 738, the Court decreed return of monies collected pursuant to an unconstitutional Ohio tax on a federally chartered bank and did not draw any distinction between a preventive injunction and a decree of restitution "if the act be performed". *Id.* at 838, 849. The Court in *Young* did not doubt this proposition. 209 U.S. at 167. We think the teaching of *Ex parte Young* is not that a prospective injunction only may issue, but that, where appropriate to deal with defiance of federal law, a federal court's equitable intervention may take an effective form.

This conclusion is buttressed by the Supreme Court's unanimous holding in *Department of Employment* v. *United States*, 385 U.S. 355. There Colorado imposed an unemployment compensation tax on employees of the American National Red Cross. Deciding that the Red Cross as a federal instrumentality was immune from such taxation, the three-judge court enjoined enforcement of the tax statute against the Red Cross and ordered a refund of taxes already paid. Faced with an Eleventh Amendment defense, the Supreme Court upheld the district court's judgment in all respects. The Court did not differentiate between the equitable reliefs and, citing *Ex parte Young* as well as *Monaco* v. *Mississippi*, 292 U.S. 313, gave no indication that the doctrine of *Ex parte*

Young did not embrace the refund of taxes wrongfully exacted or that the refund order was possible *only* because of plaintiff's status as the United States. 385 U.S. at 358.

As in *Department of Employment* v. *United States, supra,* if the only relief that could be granted under the Eleventh Amendment here were an injunction against the continuation of illegal conduct after the date of the decree, the force of federal law could be seriously blunted. The state welfare officials could withhold benefits in violation of federal law until suit is brought and a court acts, and retain the illegal savings acquired theretofore. The price would be paid by the beneficiaries of a federal program in which the state, not incidentally, agreed to participate and whose regulations it therefore agreed to abide by. 42 U.S.C. §§ 1302, 1381 *et seq.* An eligible beneficiary who brought suit contemporaneously with the initiation of the welfare officials' illegal practices and *eo instante* secured an injunction could obtain all the benefits he was entitled to, but he would forfeit part of those benefits to the unjust enrichment of the state because he did not instantly file a complaint or because federal judicial machinery consumes time.[11]

Defendants rely most heavily on *Kennecott Copper Corp.* v. *State Tax Comm'n.,* 327 U.S. 573; *Ford Motor Co.* v. *Department of Treasury of Indiana,* 323 U.S. 459; and *Great Northern Life Ins. Co.* v. *Read,* 322 U.S. 47, for the proposition that no decree ordering the payment of state monies can surmount the bar of the Eleventh Amendment. But those cases involved non-resident suits under state-created causes of action for a refund of state taxes allegedly assessed in violation of the Constitution. They reflect the special considerations that dictate non-interference by the federal judiciary in the enforcement of state tax laws where there is an express remedial

[11] There is no suggestion here that the plaintiffs have been dilatory in filing suit. However, this consideration goes to plaintiffs' equitable entitlement to the amounts requested, not to the court's power to grant relief.

How far back the retroactive award should reach will depend on the circumstances of each case. Here, the federal regulations were promulgated well in advance of their July 1, 1968, effective date and defendants knew that compliance was required as of that date.

procedure provided in state courts.[12] Cf. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 542 n. 6; *Perez* v. *Ledesma*, 401 U.S. 82, 126-127 (concurring opinion of Justice Brennan). We cannot accept them as enunciating the broad proposition that defendants seek to derive from them.

It is said that the Supreme Court has not extended the doctrine of *Ex parte Young* to permit the recovery of monetary "damages" against a state. It is true that the Eleventh Amendment has been held a bar to suits for damages to compensate for personal injuries or property damage under federal statute or law. *E.g., Parden* v. *Terminal R. Co.*, 377 U.S. 184 (suit for damages for personal injuries under FELA); *Ex parte New York*, 256 U.S. 490 (admiralty suit for property damage due to negligence). But such cases only exemplify the firmly rooted tradition that consent is required to impress treasury liability for a tort, a sensitive area because liabilty is imprecise in amount and may work great fiscal disruption on the state. See Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 29 (1963).

Defendants would characterize the relief awarded here as "damages" and thus seek to bring the district court's judgment within the purview of this doctrine. However, we think the remedy afforded here was that of restitution, which "differs greatly from the damages and penalties which may be awarded." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 402. Plaintiffs here did not seek relief for consequential damages caused by defendant's failure

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[12] In addressing the issue of Utah's consent to federal court suit, Justice Reed may have stated the true *ratio decidendi* of the immunity question in the three cases:

> "These cases declare the rule that clear declaration of a state's consent to suit against itself in the federal court on fiscal claims is required. The reason underlying the rule, which is discussed at length in the *Reed* and *Ford* cases, is the right of a state to reserve for its courts the primary consideration and decision of its own tax litigation because of the direct impact of such litigation upon its finances." *Kennecott Copper Corp.* v. *Tax Comm'n.*, 327 U.S. 573, 577.

In none of these cases was the doctrine of *Ex parte Young* mentioned.

to disburse their full statutory entitlement.[13] Rather, incident to the injunctive relief prayed for, they asked that exactly measured benefits retained by defendants which would have been paid out but for a violation of federal law be paid over to them. Since the State of Illinois obligated itself to follow federal law in disbursing welfare assistance, it cannot cogently complain that having to make those payments now, which federal law required it to make in the first place, will wreak fiscal disruption. In accepting the federal assistance program, the state must have calculated the cost of compliance. To the extent a decree of retroactive payments would actually disturb the state's finances and cause other programs to suffer, as a matter of equitable balancing of interests, it might well be inappropriate relief.[14] But that possibility is insufficient to preclude the ability of a federal court to order restitution.

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[13] Compare *Westberry* v. *Fisher*, 309 F.Supp. 12 (D. Me. 1970), where the plaintiffs requested both wrongfully withheld benefits and consequential damages for pecuniary and other losses sustained as a result of the challenged regulations. The court did not differentiate between the claims for relief, characterizing the prayer generally as for "damages."

[14] In determining whether to order the retroactive payment of benefits, district courts are exercising their equity powers and hence must engage in a balancing process. They should give consideration to the factors to be weighed in the balance identified by the Second Circuit in *Rothstein* v. *Wyman*, 467 F.2d 226, 232-236 (2d Cir. 1972).

In this case, the defendants did not pointedly bring out below countervailing considerations that might make the district court's relief an improper exercise of equitable discretion. Notably, in appealing the award of retroactive payments in *Rodriquez* v. *Swank*, 318 F.Supp. 289 (N.D. Ill. 1970) (order Oct. 29, 1970), affirmed 403 U.S. 901, the defendants argued unsuccessfully to the Supreme Court that in ordering retroactive payments (in that case by agreement to the date the lawsuit was filed), the district court clearly abused its discretion. (Jurisdictional Statement at 12.) That case involved defendants' violation of the same federal time regulations as in this case, but with respect to AFDC applicants. Furthermore, the district court here found that defendants "knew that substantial numbers of eligible AABD applicants were being deprived, contrary to the requirements of federal law, of their full AABD entitlements effective thirty days from the date of their application * * *." Since defendants did not thoroughly argue the equities below and do not really press the point here, we will not review the appropriateness of the award of retroactive relief. However, we note that in addition to the deterrent policies that might possibly be served by such an award on the facts of this case, this is not a case involving irretrievably misspent funds but one involving funds which were wrongfully not spent at all. Cf. *Rothstein* v. *Wyman*, *supra*.

As this Court recently made clear:

> "Restitution is clearly an equitable remedy. As Professor Moore put it:
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> > "'In equity, restitution is usually thought of as a remedy by which defendant is made to disgorge ill-gotten gains or to restore the status quo, or to accomplish both objectives.'
>
> The retention of 'wages' which would have been paid but for the statutory violation * * * might well be considered 'ill-gotten gains'; ultimate payment restores the situation to that which would have existed had the statute not been violated." *Rogers* v. *Loether*, 467 F.2d 1110, 1121 (7th Cir. 1972).

Here defendants, acting under color of state law, denied eligible welfare applicants timely assistance benefits to which they were entitled by federal law. In order effectively to redress the deprivation of federal rights, the district court ordered equitable restitution of the benefits wrongfully denied. As Justice Brennan stated, concurring in *Perez* v. *Ledesma*, 401 U.S. 82, 106, "* * * [T]he basic principle that in appropriate circumstances federal courts will exercise their equity power against state officials to protect rights secured and activities authorized by paramount federal law remains firmly embedded in our jurisprudence." We think that this basic principle embraces both the injunctive and the incidental restitutionary relief awarded in this case.

Thirdly, even assuming the Eleventh Amendment or sovereign immunity doctrine stood in the way of plaintiffs' suit to recover welfare benefits wrongfully withheld, Illinois has constructively consented to such an action.

No one contests the power of Congress to condition the grant of federal welfare funds to the states on their compliance with the provisions of the federal statutes and regulations relating to the states' use of these funds in their assistance programs. And no one contests the power of Congress to condition the grant of these federal monies on the states' amenability to federal court suit by the beneficiaries of these programs to recover benefits wrongfully withheld because the states failed to comply with

federal law. The questions are whether Congress intended to impose the latter condition and whether the states may fairly be said to have consented to such suits by choosing to participate in the AABD program and receive federal funds thereunder.

In *Rosado* v. *Wyman*, 397 U.S. 397, 420, the Supreme Court decided that "the avenue of *effective judicial review* [of the compatibility of a state's welfare program with federal law was open] to those individuals most directly affected by the administration of its program." (Emphasis supplied.) Although the statutes establishing the federal assistance program do not create a cause of action for these individuals, 42 U.S.C. § 1983 supplies the cause of action against state welfare officials and its jurisdictional counterpart, 28 U.S.C. § 1343(3) vests the district courts with jurisdiction to grant redress. See *Lynch* v. *Household Finance Corp.*, 405 U.S. 538. It is inferable from the purpose of Congressional enactment of the AABD program that effective judicial review might include the remedy of restoration of benefits withheld in violation of federal law.[15] Otherwise a state could engage in practices which would deny eligible recipients the full measure of that assistance which Congress has intended for them "at the minimal risk of a subsequent finding of unconstitutionality [or illegality] (if indeed it is challenged) which finding would come only some time later after the case had gone the judicial route and which would deny retroactive relief thus giving the state the desired effect and savings at least during the period of [their] existence." *Alexander* v. *Weaver*, 345 F.Supp. 666, 673 (N.D. Ill. 1973); see also *Alvarado* v. *Schmidt*, 317 F.Supp. 1027, 1042 (W.D. Wis. 1970). Certainly we are not to be understood as meaning that retrospective relief is always or even generally an appropriate remedy.[16] However, the spectre of a state, perhaps calculatingly, defying federal law and thereby depriving welfare recipients of the financial assistance Congress thought it was giving them convinces us that Congress fully meant to condition the grant

[15] The federal regulations governing the federal welfare programs contemplate court-ordered, retroactive welfare payments by expressly providing for federal financial participation in such corrective payments. 45 C.F.R. § 205.10(b)(2)(3).

[16] See note 14, *supra*.

of federal funds on the states' being susceptible to a federal court suit to obtain retrospective relief. Simply put, we think it unreasonable to presume that Congress would have intended assistance to be given to welfare recipients in conformity with federal law and at the same time deny them the possibility of gaining an effective remedy. See *Employees of Dept. of Public Health & Welfare* v. *Department of Public Health & Welfare,* 452 F.2d 820, 831 (8th Cir. 1971) (dissenting opinion), certiorari granted, 405 U.S. 1016.

By participating in the federal AABD plan, thereby agreeing to comply with federal statutes and regulations, and by receiving federal funds thereunder, Illinois surely left "the sphere that is exclusively its own and enter[ed] into activities subject to congressional regulation * * *." *Parden* v. *Terminal R. Co.,* 377 U.S. 184, 196. "Where a State's consent to suit is alleged to arise from an act not wholly within its own sphere * * * subject to the constitutional power of the Federal Government, the question whether the State's act constitutes the alleged consent is one of federal law." *Id.; Petty* v. *Tennessee-Missouri Bridge Comm'n,* 359 U.S. 275, 281-282. We cannot conceive that Illinois could legitimately expect to be able to participate in the federal program, receive federal funds in consideration for its agreement to channel them, together with state funds, to beneficiaries in compliance with federal law, and then be able to violate that law and invariably retain the savings accruing through that illegality. Thus as a matter of federal law Illinois has constructively consented to this suit. See *Parden* v. *Terminal R. Co., supra*; *Briggs* v. *Sagers,* 424 F.2d 130 (10th Cir.), certiorari denied, 400 U.S. 829 (1970); see also the opinion of the four dissenting judges in *Employees of Dept. of Public Health & Welfare* v. *Department of Public Health & Welfare, supra.*

Prospective Application of District Court's Judgment

Defendants assert that under *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, the judgment below must be accorded only prospective effect. This ground was not presented to the district judge before the entry of judgment, so that it comes too late. Even if the ground had been timely presented, defendants' contention would be meritless.

In the *Chevron Oil* case, the plaintiff was injured while working on defendant's drilling rig located on the Outer Continental Shelf off the Gulf Coast of Louisiana, and three years after the date of his injury brought suit in federal court under the "Lands Act" (43 U.S.C. § 1331 *et seq.*). At the time the lawsuit was filed, firm precedent interpreted the Act to make general admiralty law, including the equitable doctrine of laches, applicable, but more than a year later, yet before trial, the Supreme Court decided *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U.S. 352, holding state law and not admiralty doctrines should be applied under the Lands Act. Thus Louisiana's one-year statute of limitations for personal injury actions rather than the equitable doctrine of laches would be the applicable law, but the Supreme Court declined to apply the *Rodrigue* decision retroactively to time-bar plaintiff's suit. In so doing the Court generally adopted a three-pronged test for determining the retroactivity question. The first prong is that "the decision to be applied nonretroactively *must* establish a new principle of law, either by overruling clear past precedent on which litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *." 404 U.S. at 106 (emphasis supplied). Only if that test is satisfied, do we reach the second and third prongs of determining "whether retrospective operation will further or retard [the new rule's] operation" and "weigh[ing] the inequity imposed by retroactive application." *Id.* at 107.

Here defendants cannot satisfy the first test. No new principle of substantive law was enunciated by the district judge. The federal time requirements for processing applications and paying eligible AABD applicants were made effective July 1, 1968, and defendants were well aware of these mandatory maximum permissible time standards. The district court merely found defendants to be noncompliant from and after the effective date of the regulations. Insofar as the defendants might suggest that the relief awarded—payment of wrongfully withheld benefits—was a new principle of law, it should suffice to say that defendants have not shown any reliance on the absence of such a remedy, much less a legitimate reliance interest worthy of protection.

Validity of Federal Regulations

In pertinent part, the Social Security Act provides:

> "A State plan for aid to the aged, blind, or disabled, or for aid to the aged, blind, or disabled and medical assistance for the aged, must—
>
> • • • • •
>
> "(i) provide that all individuals wishing to make application for aid or assistance under the plan shall have opportunity to do so, and that such aid or assistance shall be furnished with reasonable promptness to all eligible individuals;" 42 U.S.C. § 1382(a)(8).

The Department of Health, Education & Welfare ("HEW") regulations thereunder require that decisions be made promptly on applications within 30 days for the aged and blind and 60 days for the disabled and initiation of payments to the eligible must concededly be made within the same time limits.[17] Defendants contend that these time limitations in the regulations are inconsistent with the parent statute and are therefore an unlawful abuse of rule-making authority.[18] On the contrary, these time requirements, binding on state welfare officials, are an appropriate interpretation of the Congressional mandate of "reasonable promptness." *Like* v. *Carter*, 448 F.2d 798, 802-805 (8th Cir. 1971), certiorari denied, 405 U.S. 1045; *Rodriguez* v. *Swank*, 318 F.Supp. 289, 295-296 (N.D. Ill. 1971), affirmed, 403 U.S. 901.

Effective Date for Assistance

Plaintiffs contend that AABD benefits must be paid effective from the date that an individual applies for aid if he is subsequently determined eligible and meets all of the eligibility conditions at the time of his application.[19]

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[17] See note 3, *supra*.

[18] Rule-making authority is conferred by 42 U.S.C. § 1302, which provides:

> "The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health, Education, and Welfare, respectively, shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter."

[19] See note 23, *infra*.

Plaintiffs argue that this result is compelled by federal regulations, the Equal Protection Clause of the Fourteenth Amendment, and the Illinois Public Aid Code. The district court rejected plaintiffs' arguments and held that defendants must make their determinations of eligibility and mail the first assistance check (or notice of denial of assistance) within 30 days from the date of application with respect to the aged and blind, and within 60 days of the date of application with respect to the disabled,[20] but that assistance was not required to be retroactive to the date of application.

Plaintiffs rely on certain general portions of the HEW's regulations providing that "a state plan * * * shall be in operation through a system of local offices on a statewide basis in accordance with equitable standards for assistance and administration * * *" (45 C.F.R. § 205.120(a)); that "funds will be apportioned among the political subdivisions of the State on a basis consistent with equitable treatment of individuals in similar circumstances throughout the State" (45 C.F.R. § 205.130(2)); that "the eligibility conditions imposed * * * must not result in inequitable treatment of individuals or groups * * *" (45 C.F.R. § 233.10 (a)(ii)); and that "the determination of need and amount of assistance for all applicants will be made on an objective and equitable basis * * *" (45 C.F.R. § 233.20(a)(1)). None of these general provisions compels the conclusion that "equitable treatment" is synonymous with assistance paid retroactively to the date of application for those subsequently determined eligible. On the contrary, 45 C.F.R. § 206.10(a)(6) explicitly addresses the effective date of assistance and provides: "Entitlement will begin as specified in the State plan, which (i) for financial assistance must be no later than *the date of authorization of payment* * * *" (emphasis supplied).[21] And 45 C.F.R. § 206.10(a)(3) provides that the decision to authorize

[20] The judgment incorporated the "unusual circumstances" exception in 45 C.F.R. § 206.10(a)(3).

[21] The Secretary of HEW seems specifically to have rejected a requirement that entitlement to financial assistance should attach on the date of application since 45 C.F.R. § 206.10(a)(6)(ii) goes on to say, in contradistinction to entitlement for financial assistance beginning "no later than the date of authorization of payment," that entitlement "for medical assistance *must be no later than the date of application* * * *." (Emphasis supplied.)

must be made within the applicable 30- or 60-day limitation period. Thus insofar as the general provisions for equitable treatment apply, the pointed provisions of 45 C.F.R. § 206.10(a)(6) and (3) set the parameters for equitable treatment in the specific situation as to when entitlement to financial assistance shall begin. The result plaintiffs seek is therefore not prescribed by federal regulations.

Plaintiffs' constitutional argument is that when entitlement to assistance attaches on the date the applicant is determined eligible, applicants will receive differing initial assistance amounts depending upon the speed of the administrative process. These differences are said to be arbitrary and irrational.

Although plaintiffs bitterly criticize as without social justification any policy not to pay for any period prior to the date on which eligibility is determined, it is clear that it is not our task to "decide today that the [state law] is wise, that it best fulfills the relevant social and economic objectives that [the State] might ideally espouse, or that a more just and humane system could not be devised." *Jefferson* v. *Hackney*, 406 U.S. 535, 551, quoting from *Dandridge* v. *Williams*, 397 U.S. 471, 487. There is nothing in the Constitution or the federal law which requires a state to spend more money on welfare by making assistance effective retroactive to the date of application.

With respect to the differentials in initial assistance grants due to variance in the speed of the administrative process, plaintiffs point to the gross disparities that formerly existed in paying AABD when the defendants were not complying (indeed were in egregious violation) of the federal maximum permissible time standards. But under the judgment below, these gross disparities have been rectified. All eligible aged and blind must now be paid within 30 days of their applications and all eligible disabled within 60 days therefrom. We have no showing that significant disparities within the time limits will exist when defendants are processing all applications and paying all eligible beneficiaries within the 30- and 60-day time limits. The slight disparities that are likely to occur within these limitations do not suffice to force the state

to pay all applicants from the date of their applications.[22] More precise mathematical niceties in the administrative process are not compelled by the Equal Protection Clause (cf. *Dandridge* v. *Williams, supra; Jefferson* v. *Hackney, supra*), and therefore we approve the district court's holding that there is no constitutional requirement that welfare assistance be paid retroactively to the date of application.[23]

Finally, plaintiffs contend that the Illinois Public Aid Code, Ill. Rev. Stat. 1971, ch. 23, § 3-1, requires that benefits be paid retroactive to the date of application. That statute provides:

> "Financial aid in meeting basic maintenance requirements for a livelihood compatible with health and well-being shall be given under this article to or in behalf of aged, blind, or disabled persons who meet the eligibility conditions of §§ 3-1.1 through 3-1.6."

The Circuit Court of Cook County upheld such an interpretation of the Illinois Act in *People* ex rel. *Naughton* v. *Illinois Dept. of Public Aid*, No. 70 L. 11380 (1971), pending on appeal to the Appellate Court of Illinois.[24] Nevertheless, we find the statute far from clear on this question. We think it especially appropriate to leave interpretation of this opaque statute to the Illinois courts, since the scheme of cooperative federalism created by the matching-grant program already has inherent strains and "it is not the business of the federal courts needlessly to exacerbate

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[22] Assuming *arguendo* that any differentials due to the speed of the administrative process were unjustified, still no requirement that all applicants be paid retroactively to the date of their applications would be constitutionally necessary since defendants could presumably pass constitutional muster with an administrative procedure that dealt exactly uniformly with all applicants, though not paying them from the date of their applications, even though it resulted in less welfare spending and in some receiving initial payments in lesser amounts than under the present administrative scheme.

[23] Although defendants have not advanced the argument, neither have plaintiffs drawn our attention to any requirement that defendants assume a possibly greater administrative burden of determining eligibility retrospectively as of date of application. It may be that in most cases a determination of eligibility will mean that the applicant was eligible on the date he applied, but plaintiffs imply that the two may not be coincident.

[24] Plaintiffs assert that defendants did not appeal this phase of the *nisi prius* state court's ruling. The appeal has not yet been argued.

those problems." *Rothstein* v. *Wyman*, 467 F.2d 226, 232 (2d Cir. 1972). Consequently we restrict our holding to a decision that benefits paid retroactively to the date of application is required neither by federal regulations nor the Constitution.[23]

Award of Punitive Damages

Plaintiffs sought $100,000 punitive damages from defendant Harold O. Swank, former Director of the Illinois Department of Public Aid. In refusing to grant such damages, the district court held that the permanent injunction was a sufficient deterrent to future violations. As in *Westberry* v. *Fisher*, 309 F.Supp. 12, 17 (D. Me. 1970), the record is utterly devoid of any proof of abuse of discretionary authority, malice, or ill-will on the part of defendant Swank. In our view, the district judge did not abuse his discretion in denying punitive damages. See *Francis* v. *Davidson*, 340 F.Supp. 351, 369-370 (D. Md. 1972). It is true that the district court granted plaintiff's motion for an order that facts be taken as established, which included statements that Swank knew that eligible AABD applicants were not treated consistently and were not paid within the federal time limitations. Nevertheless, absent any further proof, as the district judge obviously recognized, the granting of that motion does not warrant such a harsh remedy.

For the foregoing reasons, the judgment of the district court is affirmed and the stay with respect to paragraph 5 of the judgment below is dissolved.

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[23] We realize that *Class* v. *White*, ... F.Supp. .... (D. Conn. 1972), is to the contrary, but there even HEW, as *amicus curiae*, agreed that defendant's classifications for the effective date of assistance were not invalid.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1410

JOEL EDELMAN, DIRECTOR OF ILLINOIS DEPARTMENT OF PUBLIC AID, AND SUCCESSOR TO EDWARD WEAVER, FORMER DIRECTOR OF PUBLIC AID,

Petitioner,

vs.

JOHN JORDAN, et al.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street,
Chicago, Illinois,

DONALD S. CARNOW,
Special Assistant Attorney General,
300 West Washington Street,
Chicago, Illinois,

Printed by Authority of the State of Illinois 365

PETITION FOR CERTIORARI FILED APRIL 16, 1973
CERTIORARI GRANTED JUNE 11, 1973

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Constitutional Provisions	3
Statutory Provision	4
Questions Presented	4
Statement of the Case	4
Summary of Argument	9
Argument	10
I. A SUIT SEEKING PAYMENT OF RETROACTIVE BENEFITS FOR A CLASS OF WELFARE RECIPIENTS IS WITHIN THE CLEAR MEANING OF THE ELEVENTH AMENDMENT PROHIBITING THE EXTENSION OF THE JUDICIAL POWER OF THE UNITED STATES TO ANY SUIT IN LAW OR EQUITY COMMENCED OR PROSECUTED AGAINST ONE OF THE UNITED STATES	10
(A) There Is No Express Language In The Social Security Act Depriving The States Of Their Immunity Under The Eleventh Amendment	16
(B) There Is No Language, Express Or Implied, In The Social Security Act Which Grants Welfare Recipients The Right To Retroactive Benefits	17

(C) There Ie No Implied Consent To Waiver Of Eleventh Amendment Immunity As A Result Of Illinois' Participation In The Federally Funded Public Assistance Program 26

Conclusion 37

CITATIONS

CASES:

Arrowjet General Corporation v. *Askew*, 452 F. 2d 819 (5th Cir. 1971) 31, 32

Brennan v. *University of Kansas*, 451 F. 2d 1287 (10th Cir. 1971) 32

Bromley v. *McCaughn*, 280 U.S. 124 (1929) 20

Chicago, M., St.P., & P. R. v. *Acme Fast Freight*, 336 U.S. 465 (1948) 21

Chicago Welfare Rights Organization v. *Weaver*, 5 Ill. App. 3rd 655, 284 N.E. 2d 20 (1972) 34, 35

Commissioner v. *Estate of Bosch*, 387 U.S. 456 (1967) 21

Day v. *Woodworth*, 13 How. 363 (1852) 20

Duhne v. *New Jersey*, 251 U.S. 311 (1920) 10

Duplex Printing Press Company v. *Deering*, 254 U.S. 443 (1920) 21

Edelen v. *Hogsett*, 44 Ill. 2d 215, 254 N.E. 2d 435 (1969) 33

Employees of the Department of Public Health and Welfare, State of Missouri v. *Department of Public Health and Welfare, State of Missouri*, 36 L. Ed. 251 (1973) 10-11, 16, 26, 36

Ex Parte Young, 256 U.S. 490 (1921) 9, 14, 15, 28, 30
Fleischman Distilling Corporation, et al. v. *Maier Brewing Company, et al.*, 386 U.S. 714 (1967) 20
Ford Motor Company v. *Treasury Department of the State of Indiana*, 323 U.S. 459 (1944) 14, 29, 30
Georgia v. *Redwine*, 342 U.S. 299 (1952) 30
Gomez v. *Florida State Employment Service*, 417 F. 2d 569 (5th Cir. 1970) 17
Great Northern Life Insurance v. *Reed*, 322 U.S. 47 (1944) 29, 30
Hagood v. *Southern*, 117 U.S. 52 (1886) 37
Hans v. *Louisiana*, 134 U.S. 1 (1890) 10
Huckaba v. *Cox*, 14 Ill. 2d 126, 150 N.E. 2d 832 (1958) 33
Illinois v. *Sanitary District*, 210 Ill. 171, 71 N.E. 334 (1904) 14
J. I. Case Company v. *Borak*, 377 U.S. 426 (1964) .. 17
Kennicott Copper Corporation v. *State Commission*, 327 U.S. 573 (1946) 29
Larson v. *Domestic and Foreign Commerce Corporation*, 337 U.S. 682 (1949) 37
Louisiana v. *Jumel*, 107 U.S. 711 (1883) 37
Mitchell v. *Kentucky Finance Company*, 359 U.S. 290 (1959) 21
National Woodwork Manufacturers Association v. *N.L.R.B.*, 386 U.S. 612 (1967) 21
North Carolina v. *Temple*, 134 U.S. 22 (1890) 37

Parden v. *Terminal Railway*, 377 U.S. 184 (1964) ..10, 26

Powers v. *Tealeander*, 129 Ill. App. 2d 10, 262 N.E. 2d 342 (1970) 15

Rodriguez v. *Swank*, 403 U.S. 901 (1971).....

Rodriguez v. *Swank*, 318 F. Supp. 289 (N.D. Ill. 1970) 13-14, 25

Rosado v. *Wyman*, 397 U.S. 397 (1970) 18

Rosado v. *Wyman*, 322 F. Supp. 1173 (on remand) ..18-19

Rothstein v. *Wyman*, 467 F. 2d 226 (2d Cir. 1972), *cert. den.* 41 L. Wk. 3527 .....12, 17, 24, 28, 31, 36

State Department of Health and Rehabilitation Services v. *Zarate*, 407 U.S. 918 (1972), summarily affirming 347 F. Supp. 1004 (S.D. Fla. 1971) 11-12

Sterrett v. *Mother's and Children's Rights Organization*, 409 U.S. 809 (1972), summarily affirming sub nom. *Mother's and Children's Rights Organization*, Civil No. 70 F. 138 (N.D. Ind., April 14, 1972), on remand sub nom. from *Carpenter* v. *Sterrett*, 405 U.S. 971 (1972) 11, 12

Schwing v. *Miles*, 367 Ill. 436, 11 N.E. 2d 944 (1937) 34

Shapiro v. *Thompson*, 394 U.S. 618 (1969) 12

Tunstal v. *Brotherhood of Locomotive Firemen and Engineermen*, 323 U.S. 210 (1944) 17

Tesse v. *Huntington*, 23 How. 2 (1860) 20

United States v. *American Trucking Association*, 310 U.S. 534 (1939) 21

United States v. *Dickerson*, 310 U.S. 554 (1939) 21

United States v. *United Mine Workers*, 330 U.S. 258 (1946) 21

Wright v. *Brinton Branch Bank*, 300 U.S. 440 (1936) 21

Wyman v. *Bowens*, 397 U.S. 49 (1970) affirming per curiam sub nom. *Gaddis* v. *Wyman*, 304 F. Supp. 717 (S.D. N.Y. 1969) 12

Young v. Higbee, 324 U.S. 204 (1944) 20

MISCELLANEOUS

Hart, "The Time Chart of Justices, Forward to the Supreme Court, 1958 Term," 73 Harv. L. Rev. 84 (1959) 13

H.R. 16311, 91st Cong., 2d Sess., c169-70 (1970) 19

H.R. Rep. No. 615, 74th Cong., 1st Sess. (1935) 22

"The Purpose of Benefits to Both Types of Programs is to deal with Need," Staff report to the Chairman of the Sub-Committee on Social Security for the Committee on Ways and Means of the House of Representatives, 83rd Cong., 2d Sess. (1955) 23

Senate Finance Committee, Report on H.R. 6635, 76th Cong., 1st Sess. (1939) 22

"Social Security after 18 Years," Report to the Staff to the Chairman of the Sub-Committee of the House Committee on Ways and Means (1955) 23

UNITED STATES CONSTITUTION AND STATUTES

United States Constitution, Eleventh Amendment 2, 4, 8-18, 20, 21, 26, 28, 29, 37

28 U.S.C. § 1254(1) 2

29 U.S.C. § 216(b) 28

42 U.S.C. §§ 303-306, 1201-1206, 1351-1355, 1381-1385 (1971) 5
42 U.S.C. § 604 (1971) 2, 17
42 U.S.C. § 1302 (1971) 5
42 U.S.C. § 1983 28

FEDERAL REGULATIONS

45 C.F.R. § 205.10(b) (2) (3) 28
45 C.F.R. § 206.10(a) 5, 6

STATE CONSTITUTION

Constitution of Illinois, 1870, Article IV, § 26 32
Constitution of Illinois, 1970, Article XIII, § 4 32

STATE STATUTES AND REGULATIONS

Ill. Rev. Stat., Ch. 23, §§ 3-1 to 3-12 (1971) 5
Ill. Rev. Stat., Ch. 37, § 427 et seq. (1971) 33
Ill. Rev. Stat., Ch. 127, § 801 (1971) 33
Ill. Categorical Assistance Manual § 4004 6

IN THE

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OCTOBER TERM, 1972

No. 72-1410

JOEL EDELMAN, DIRECTOR OF ILLINOIS DEPARTMENT OF PUBLIC AID, AND SUCCESSOR TO EDWARD WEAVER, FORMER DIRECTOR OF PUBLIC AID,

Petitioner,

VS.

JOHN JORDAN, et al.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the District Court is unreported and has been included as part of the Appendix in Respondents' brief in opposition to certiorari. The opinion of the Court of Appeals for the Seventh Circuit is reported at 472 F. 2d 985 (7th Cir. 1973) and also is printed as part of the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 18, 1973. No petition for rehearing was filed. This Court's jurisdiction was invoked under 28 U.S.C. Section 1254(1). The Petition for Writ of Certiorari was granted on June 11, 1973.

CONSTITUTIONAL PROVISIONS

Eleventh Amendment to the United States Constitution.

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens of Subjects or another foreign State."

STATUTORY PROVISIONS

Section 604 of the Social Security Act, 42 U.S.C. Section 604, is herein after set out.

> **§604. Operation of State plans—Payments withheld for noncompliance with approved plan**
>
> (a) In the case of any State plan for aid and services to needy families with children which has been approved by the Secretary, if the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of such plan, finds—
>
> (1) that the plan has been so changed as to impose any residence requirement prohibited by section 402(b) [42 USCS § 602(b)], or that in the administration of the plan any such prohibited requirement is imposed, with the knowledge of such State agency, in a substantial number of cases; or
> (2) that in the administration of the plan there is

a failure to comply substantially with any provision required by section 402(a) [42 USCS § 602(a)] to be included in the plan;

the Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure) until the Secretary is satisfied that such prohibited requirements is no longer so imposed, and that there is no longer any such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure).

(b) No payment to which a State is otherwise entitled under this part [42 USCS §§ 601-610] for any period before September 1, 1962, shall be withheld by reason of any action taken pursuant to a State statute which requires that aid be denied under the State plan approved under this part [42 USCS §§ 601-610] with respect to a child because of the conditions in the home in which the child resides; nor shall any such payment be withheld for any period beginning on or after such date by reason of any action taken pursuant to such a statute if provision is otherwise made pursuant to a State statute for adequate care and assistance with respect to such child.

(Aug. 14, 1935, c. 531, Title IV, Part A, § 404, 49 Stat. 628; Aug. 28, 1950, c. 809, Title III, Part 6, § 361(c), (d), 64 Stat. 558; May 8, 1961, P. L. 87-31, § 4, 75 Stat. 77; July 25, 1962, P. L. 87-543, Title I, Part A, §§ 104(a)(5)(B), 107(b), 76 Stat. 185, 189; Jan. 2, 1968, P. L. 90-248, Title II, Part 3, §§ 240 (b), 241 (b)(4), Part 4, § 245, 81 Stat. 911, 916, 918.)

QUESTIONS PRESENTED

(1) Whether a suit seeking payment of retroactive benefits by a class of welfare recipients is within the clear meaning of the Eleventh Amendment proibiting the extension of the judicial power of the United States to any suit in law or equity commenced or prosecuted. against one of the United States.

(A) Whether there is any express language in the Social Security depriving the States of their immunity under the Eleventh Amendment.

(B) Whether there is any language, express or implied, in the Social Security Act which grants welfare recipients the right to retroactive benefits.

(C) Whether there is any implied consent to waiver of the Eleventh Amendment immunity as a result of Illinois' participation in the federally funded Public Assistance Program.

(2) Whether standards enunciated by the Court for determining the effect to be given a judgment require prospective application of this case and,

(3) Whether federal regulation relied upon by Respondents are inconsistent with the applicable provisions of the Social Security Act, and are therefore invalid.

STATEMENT OF THE CASE

John Jordan, plaintiff-respondent (hereinafter "plaintiff"), filed a Complaint in the United States District Court for the Northern District of Illinois, individually and as representative of a class, seeking injunctive relief and damages for violations of federal welfare regulations against Edward T. Weaver and Harold O. Swank, former Directors of the Illinois Department of Public Aid; David

L. Daniel, Director of the Cook County Department of Public Aid; and Edward J. Barrett, Comptroller of Cook County, defendants-appellants (hereinafter "defendants").

Specifically, plaintiffs alleged that Section 4004, and sub-sections thereunder, of the Illinois Categorical Assistance Manual (set forth in the Record at page 169) were invalid as being inconsistent with thirty-day and sixty-day determination requirements as defined by the United States Department of Health, Education and Welfare ("HEW") in 45 C.F.R., Section 206.10(a). Defendant answered denying the material allegations of the Complaint.

Aid to the Aged, Blind and Disabled ("AABD") is one of the categorical programs administered by the Illinois Department of Public Aid ("IDPA") pursuant to the Illinois Public Aid Code, Ill. Rev. Stat., Ch. 23, Sections 3-1 to 3-12 (1971). The program is funded 50% by the State. The other 50% is provided by the Federal Government under the Social Security Act, 42 U.S.C., Sections 303-306; 1201-1206; 1351-1355; 1381-1385 (1971). The IDPA issued regulations pursuant to Ill. Rev. Stat. Ch. 23, Sections 12-13 (1971), and HEW, which administers AABD for the Federal Government, promulgated regulations pursuant to 42 U.S.C., Section 1302 (1971). Plaintiffs contended that the IDPA was required to process all applications for welfare assistance for the aged, blind and disabled within thirty days of the initial application. Having failed to process such applications within the specified time, so plaintiffs contended, the plaintiff class was entitled to monetary award, commencing on July 1, 1968, to be computed by the amount of money the members of the class would have received had the applications been processed within 30 days. Plaintiff also sought punitive dam-

ages in the amount of $100,000 against defendant Harold O. Swank. In subsequent Amended Complaints filed in the U.S. District Court, plaintiffs alleged that applications for benefits to the disabled had to be processed within 60 days under HEW regulations.

Defendants never claimed that all such applications were processed within 30 or 60 days. Indeed, defendants pointed out that some applications take longer to process than others because of the various factors which must be determined in order to establish the eligibility of particular applicants.

The District Court granted summary judgment for plaintiffs and issued a Memorandum Opinion and Order on February 4, 1972. On March 15, 1972, the District Court entered a Judgment Order which provided, *inter alia*, that:

> 1.) The IDPA and the individual defendants be permanently enjoined from failing to make determinations of eligibility within 30 days of initial application for aid to the aged and blind under the Illinois AABD program, and within 60 days from the date of application as to applicants for aid to the disabled under the AABD program;
>
> 2.) Aid for those found eligible be initiated not later than the final date for eligibility determination;
>
> 3.) 45 C.F.R., Section 206.10(a), be strictly complied with and any inconsistent provisions in the Illinois Categorical Assistance Manual (namely, Section 4004) be declared invalid insofar as inconsistent with that regulation.

The Court also found for the plaintiff on the monetary award question. It required defendants to make all payments not made to all applicants who had applied to the

IDPA for AABD benefits between July 1, 1968 and April 16, 1972, and were subsequently determined eligible by the IDPA, as follows:

(a) For those aged and blind applicants whose first full AABD check was not mailed within thirty days from the date of application, damages were to be paid by the State of Illinois to all eligible applicants equal to the AABD assistance they would have received for the period beginning with the thirtieth day from the date of application to the date the applicant's entitlement became effective.

(b) (i) For those disabled applicants who applied between July 1, 1968 and December 31, 1970, whose first full AABD check was not mailed within forty-five days from the date of application, damages were to be paid by the State of Illinois to all eligible applicants equal to the AABD assistance they would have received for the period beginning with the forty-fifth day from the date of application to the date the applicant's entitlement became effective;

(ii) For those disabled applicants who applied between January 1, 1971 and April 16, 1971, whose first full AABD check was not mailed within sixty days from the date of application, damages were to be paid by the State of Illinois to all eligible applicants equal to the AABD assistance they would have received for the period beginning with the sixtieth day from the date of application to the date the applicant's entitlement became effective.

The Court required these AABD benefits to be mailed the defendant to those persons currently receiving AABD within eight months with an explanatory letter, approved by Plaintiffs' attorney.

For those persons not presently receiving AABD from the IDPA, the Court required this action:

(a) A certified letter (return receipt requested), approved by plaintiffs' attorney, must be sent to the last known address of any person who is eligible under the program for damage payments set out above, informing him that he is entitled to a specified amount of AABD benefits wrongfully withheld. That person may claim the amount, computed under the damage formula, by contacting the appropriate County Department of Public Aid within 45 days from the receipt of said letter.

(b) If the appropriate County Department of Public Aid does not receive a claim for the AABD benefits within 45 days from the date of actual notice to the person, the right to said AABD benefits shall be forfeited and the file shall be closed. The Court also declared that persons who do not receive actual notice do not forfeit their rights to AABD benefits wrongfully withheld under this provision. (Record 339.)

An appeal then followed to the Court of Appeals. It was based on substantially the same grounds as are raised in this petition for writ of certiorari; in particular, it was pointed out that an action for a monetary award filed against state officials in their official capacity, the award to be discharged out of the Illinois General Revenue Fund, could not be maintained in the Federal District Court in view of the provisions of the Eleventh Amendment to the United States Constitution. The Seventh Circuit Court of Appeals rejected that contention, and found that a retroactive monetary award given to welfare recipients did not contravene the prohibitions of the Eleventh Amendment to the United States Constitution.

SUMMARY OF ARGUMENT

Suit seeking payment of retroactive benefits by a class of welfare recipients is within the prohibition of the Eleventh Amendment precluding the extension of the judicial power of the United States to any suit in law or equity commenced or prosecuted against one of the United States. Affirmative relief in the form of payment of money from the fisc of the State goes beyond the parameters of the *Ex Parte Young* fiction and hence contravenes the Eleventh Amendment.

There is nothing in the language of the Social Security Act which expressly requires a state to waive its immunity as a condition of participation in the Federal Assisted Public Welfare Program. There is also an absence of any statutory language giving welfare recipients an express or implied right to retroactive assistance. Nor is there anything in the legislative history of the Social Security Act manifesting an implied right to retroactive assistance. Quite to the contrary there is clear and convincing legislative history indicating that Congress only intended that a recipient's present need be funded, abrogating any inference of an implied right.

ARGUMENT

Joel Edelman, Director of the Illinois Department of Public Aid, prays that the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on January 18, 1973, be reversed. In support of said prayer, defendants respectfully submit the following Comments and Arguments.

I.

A SUIT SEEKING PAYMENT OF RETROACTIVE BENEFITS FOR A CLASS OF WELFARE RECIPIENTS IS WITHIN THE CLEAR MEANING OF THE ELEVENTH AMENDMENT PROHIBITING THE EXTENSION OF THE JUDICIAL POWER OF THE UNITED STATES TO ANY SUIT IN LAW OR EQUITY COMMENCED OR PROSECUTED AGAINST ONE OF THE UNITED STATES.

The Eleventh Amendment to the United States Constitution reads:

> "The judicial power of the United States shall not be construed to extend to any suit in *law* or *equity* commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Established principles of constitutional law provide that a nonconsenting State is immune from suits in law or equity brought in Federal Court by its own citizens as well as by citizens of another state. *Hans* v. *Louisiana*, 134 U.S. 1 (1890); *Duhne* v. *New Jersey*, 251 U.S. 311 (1920); *Parden* v. *Terminal Railway*, 377 U.S. 184 (1964); and *Employees of the Department of Public Health and*

Welfare, State of Missouri v. *Department of Public Health and Welfare, State of Missouri*, 36 L. Ed. 251 (1973).

It is respectfully submitted that a suit seeking payment of a monetary award, by a class of welfare recipients sounding in equity, whether it be characterized as restitution or damages, is within the clear meaning of the Eleventh Amendment, and hence the judgment of the United States District Court for the Northern District of Illinois, and the opinion and mandate of the Seventh Circuit affirming that judgment were in error and should be reversed.

Both the Seventh Circuit in its opinion and the Respondents in their brief in opposition explicitly argue that this Honorable Court is foreclosed from an independent analysis of the Eleventh Amendment issue. (see brief for Respondents in opposition pages 6-8)

The Seventh Circuit found conclusive precedent in several summary affirmances of the Court. In each of these cases the Eleventh Amendment issue was briefed, but not discussed by the Court.[1] The cases relied upon by the Seventh Circuit and now by the Respondents were *Sterrett* v. *Mother's and Children's Rights Organization*, 409 U.S. 809 (1972), summarily affirming sub nom. *Mother's and Children's Rights Organization*, Civil No. 70 F. 138 (N.D. Ind., April 14, 1972), on remand sub nom. from *Carpenter* v. *Sterrett*, 405 U.S. 971 (1972); *State Depart-*

(1) Presumably, all other portions of the opinion are obiter dictum since such language was not necessary for the ultimate disposition of the case. The obiter dictum, however, will be treated in full as Respondents' Brief in opposition to certiorari essentially followed the outline of the Seventh Circuit opinion.

ment of Health and Rehabilitative Services v. *Zarate*, 407 U.S. 918 (1972), summarily affirming, 347 F. Supp. 1004 (S.D. Fla. 1971); *Wyman* v. *Bowens*, 397 U.S. 49 (1970), affirming per curiam, sub nom., *Gaddis* v. *Wyman*, 304 F. Supp. 717 (S.D. N.Y. 1969); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), affirming 270 F. Supp. 331 (D. Conn. 1967).

In each of these direct appeals, the Eleventh Amendment argument raised by the Appellants was not discussed in the ultimate disposition of the case by the Court.[2] Accordingly, there has never been any decisive utterance of the Court on the application of the Eleventh Amendment to the suits of welfare recipients seeking retroactive monetary awards.

Your petitioner submits that the treatment of summary affirmances as conclusive precedent without judicial discussion is improper. The Second Circuit Court of Appeals in *Rothstein* v. *Wyman*, 467 F. 2d 226, 241 (1972) properly characterized summary affirmances in the Eleventh Amendment field as mere evidence that "the Supreme Court has not yet come to grips with the problem of

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(2) Each of these cases reached the same result, and on appeal all were affirmed. Of these affirmances, two were summary. See Sterrett v. Mother's and Children's Rights Organization, 409 U.S. 809 (1972) summarily affirming sub nom. Mother's and Children's Rights Organization, Civil No. 70 F. 138 (N.D. Ind. April 14, 1972) on remand sub nom. from *Carpenter* v. *Sterrett*, 405 U.S. 971 (1972); *State Department of Health, Education and Rehabilitative Services* v. *Zarate*, 407 U.S. 918 (1972), summarily affirming, 347 F. Supp. 1004, (S.D. Fla. 1971). One case, *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) was affirmed without any discussion of the Eleventh Amendment issue, and another, *Wyman* v. *Bowens*, 397 U.S. 49 (1970) was affirmed per curiam on the authority of *Shapiro*.

retroactive public assistance payments as a remedy which Federal Courts either can or should order to be made."

Indeed, there is compelling logic for the proposition that summary affirmances should not be considered as binding precedent. Often, it is impossible to determine the rationale of a summary affirmance. Further, even if the rationale could be ascertained, it frequently cannot be determined whether a majority of the Court concurred in the rationale or simply the result. There is considerable academic thought that summary affirmances give rise to ambiguity even when controlling authority may be cited by the Court. See *Hart*, "The Time Chart of Justices, Forward to the Supreme Court, 1958 Term," 73 Harv. L. Rev. 84, 98-99 (1959). Under the circumstances, it is respectfully submitted that the rules to be derived from such opinions are too uncertain for application.

Respondents argue that your petitioner failed to raise the Eleventh Amendment on defense in the trial court, and only alleged it for the first time on appeal to the Seventh Circuit. The Seventh Circuit did not find this argument sufficiently sound so as to preclude its own analysis.

It is admitted by your petitioner that it did not raise the Eleventh Amendment defense in the trial court. There were reasons for this omission. There was never any language in the Respondent's complaint from which the Eleventh Amendment defense could necessarily be anticipated. (See Appendix page ——). The Respondents never sought retroactive benefits in their prayers for relief, but sought the issuance of a mandatory injunction. Likewise the Complaint in their companion case of *Rodriguez*

v. *Swank*, 318 F. Supp. 289 (N.D. Ill. 1970) did not suggest a remedy of restitution, and their request for this relief only appeared at the time of entry of the final order. Hence, the legal defense could not be anticipated. Further, it would have been futile for Illinois to have raised the Eleventh Amendment defense with respect to prospective application of the law. The application of the fiction of *Ex Parte Young*, 256 U.S. 490 (1921) was and is quite clear. Clearly, the Eleventh Amendment does not prohibit Federal Courts from ordering state officials to bring their conduct into conformity with federal law. Therefore, no question was entertained about the District Court's jurisdiction to enter a declaratory judgment or mandatory injunction compelling future conformity of the administration of the Illinois Public Welfare program with Federal Statutes and Federal Regulations.

Furthermore, the Illinois Assistant Attorney General who appeared on behalf of the Illinois Department of Public Aid in the trial court as a matter of law could not waive the Eleventh Amendment defense, *Ford Motor Company* v. *Treasury Department of the State of Indiana*, 323 U.S. 459, 467 (1944).[3] In that case, Mr. Justice

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(3) Under any circumstances, the law is clear in Illinois that an Assistant Attorney General can not waive the body politic's defense of Sovereign Immunity as it may be incorporated into the Eleventh Amendment prohibition. In *Illinois* v. *Sanitary District*, 210 Ill. 171, 173, 71 N.E. 334, 335 (1904), it was said:

> ". . . the Attorney General cannot, as we think, waive the State's immunity from being placed in the position of a defendant. Nor can he commit or bind the state by filing a cross-petition, the result of which is to place the State in the attitude of a de-

Reed in delivering the opinion of the Court stated as follows:

> "The objection to Petitioner's suit as a violation of the Eleventh Amendment was first made and argued by Indiana in this Court. This was in time, however. The Eleventh Amendment declares a policy and sets forth an explicit limitation on the Federal judicial power of such compelling force that this Court will consider the issue arrising under this amendment in this case even though urged for the first time in this Court."

What is in controversy are the limitations of the application of the *Ex Parte Young* fiction. The Respondents cannot avoid the jurisdictional bar of the Eleventh Amendment merely because their suit is nominally against a State official rather than the body politic when the relief sought is the affirmative payment of funds from the State's fisc. It is submitted that if a suit seeks to declare a liability which must be met from the General Revenue Fund of the body politic, Federal Courts are

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fendant in the proceeding. *Ex Parte Dunn*, 8 S.C. 207; *Dabney* v. *Bank*, 3 Id. 124; *Adams* v. *Bradley*, 5 Sawyer 217; 26 Am. and English Ency. of Law, (2d Ed.) 486.

The authorities seem agreed that where the constitutional exemption can be waived the authority to do so rests with the Legislature. (Citations omitted) We are not called upon to determine whether the legislature under our Constitution could waive the exemption or authorize a suit or proceeding to be brought against the State, as it has not attempted to do so in the case before us."

Likewise see *Powers* v. *Tealeander*, 129 Ill. App. 2d 10, 262 N.E. 2d 342 (1970).

without jurisdiction to entertain the suit without the express consent of the local body politic.

(A) There Is No Express Language In The Social Security Act Depriving The States Of Their Immunity Under The Eleventh Amendment.

As was recently stated by Mr. Justice Douglas in *Employees* v. *Missouri Public Health Department*, Supra, at 36 L. Ed. 2d 256:

> "The history and tradition of the Eleventh Amendment indicate that by reason of that barrier a Federal Court is not competent to render judgment against a non-consenting State. . . ."
>
> " . . . it is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown in vast proportions in its application, desired silently to deprive the state of an immunity they have long enjoyed under another part of the Constitution. Thus, we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal form."

Similarly there is no language in the Social Security Administration Act that either expressly or impliedly shows an intent on the part of Congress to deprive the States of their immunity under the Eleventh Amendment.[4] Despite this the Seventh Circuit relied upon an implied consent theory.

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(4) There is also nothing in the compact between the Illinois Department of Public Aid and the United States Department of Health, Education and Welfare that expressly conditions Illinois' participation in the federally assisted welfare programs on its waiver of immunity under the Eleventh Amendment.

There is a heavy burden of proof imposed upon the Respondents to establish express language in the statute showing that Congress intended the States to waive their Eleventh Amendment immunity as a condition of participation in the federally aided program. *Rothstein* v. *Wyman*, 467 F. 2d 226, (2nd Cir., 1972), cert. den. 41 L.Wk. 3527.

(B) There Is No Language, Express Or Implied, In The Social Security Act Which Grants Welfare Recipients The Right To Retroactive Benefits.

Consistent with the Eleventh Amendment, Congress enacted an apparently exclusive remedy in the form of the cut-off of future federal funds when a State failed to conform with Federal Law 42 U.S.C. 604. There is nothing in this statutory enactment that provides for an express or implied right to payment of retroactive assistance.[5] The

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(5) Your petitioners do not question the right of Federal Courts to fashion an appropriate remedy where these rights are implied in the language of the enabling statutes. Indeed, the absence of remedies in certain statutes has not prevented courts from fashioning a remedy. For example, see *Tunstal* v. *Brotherhood of Locomotive Firemen and Engineermen*, 323 U.S. 210 (1944) (under the Railway Labor Act); *J. I. Case Company* v. *Borak*, 377 U.S. 426 (1964) (granting a private cause of action under Section 14A of the Securities Act of 1934); *Gomez* v. *Florida State Employment Service*, 417 F. 2d 569 (5th Cir., 1970) (granting a remedy under the Wagner-Peyser Act, 29 U.S.C. Sections 49-49K (1970)).

However, there is strong authority for the proposition that Congress never intended the creation of a right to retroactive assistance to welfare recipients. See argument, infra. The thrust of your petitioner's theory is that there

remedy provided, as heretofore indicated, is the cut-off of *future* federal funds,[6] no mention being made of a

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is no implied right to retroactive assistance granted to welfare recipients under the Social Security Administration Act; and, even assuming arguendo that there is such a right, there is no language expressed, or implied, in the Social Security Act that would avoid the bar of the Eleventh Amendment prohibition extending the judicial power of the United States to suits in law or equity prosecuted or commenced against the State. As your petitioner establishes, infra, Illinois, contrary to Respondent's false assertion, still recognizes Sovereign Immunity. In essence, it is the position of your petitioners that if such a right is existent, it would have to be exercised and enforced in the Illinois Court of Claims.

(6) In addressing the question of the existence of a right to retroactive assistance, as opposed to the separate and distinct question of the jurisdiction of the Federal Court to entertain such a suit, this Honorable Court's decision in *Rosado* v. *Wyman*, 397 U.S. 397 (1970) may be instructive and possibly dispositive of this issue. In that case, this Court stated at 421-2:

> " . . . we remand the case to the District Court to fix a date that will afford New York an opportunity to revise its program in accordance with the requirements of Section 402 (a) (23) if the state wishes to do so.
>
> * * *
>
> . . . or, should New York choose not to submit a revamped program by the determined date, issue its order restraining the further use of federal monies pursuant to the present statute."

The United States District Court for the Southern District of New York on remand in *Rosado*, supra, interpreted that decision as precluding the ordering of retroactive assistance (322 F. Supp. 1173, 1195-6):

right of welfare recipients to retroactive payments.

The United States Department of Health, Education and Welfare recently sought legislation that would have granted a right of retroactive assistance to welfare recipients. H.R. 16311, 91st. Cong. 2d. Sess. c169-70 (1970). This legislation was never enacted, which makes it clear that Congress never intended to give, and now has re-

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> "Plaintiffs seek to invoke the equity powers of this Court to grant Plaintiffs and other members of their class the amounts they would have received, over and above what they actually did receive, if the states AFDC payment schedules had been in compliance with Section 402 since July 1, 1969. Under the mandate of the Supreme Court, this Court lacks power to grant such relief.
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> • • •
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> Concern over the strong implications for federalism implicit in congressional decisions to encourage State administered AFDC programs undoubtedly motivated the Supreme Court to emphasize that the State was to be given a choice.
>
> Supporting this conclusion is the fact that the Supreme Court afforded the State time to revise its program before the District Court was empowered to consider a restraint in the further use of federal money in the state AFDC program. *Rosado* v. *Wyman*, 397 U.S. 397, 421-422. If a remedy for underpayments had, in a sense, vested, this limitation in the District Court's power would have been inappropriate."

The denial of a substantial retroactive monetary award in *Rosado* was not appealed by the Plaintiffs.

The denial of certiorari in *Rothstein* v. *Wyman*, 41 L.W. 3527, and this Court's opinion in *Rosado* v. *Wy-*

jected legislation giving, welfare recipients a right to retroactive assistance. As pointed out in *Employees*, supra, "It is not easy to infer that Congress in legislating . . . desired silently to deprive the States of an immunity they have long enjoyed (under the Eleventh Amendment)."

No demonstration has been made by the Respondents of any express language in the Social Security Act whereby the Eleventh Amendment immunity is waived by a State's participating in the federally assisted program. In the absence of such a demonstration, it must

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man, supra, gives strong support to the conclusion that there are both constitutional and federal statutory bars to retroactive monetary awards being granted to welfare recipients. Despite the Seventh Circuit's characterization of retroactive awards as equitable restitution, it is respectfully submitted that the characterization is improper. It is an elementary principle of equity jurisprudence that the Court will look to the substance of a particular transaction as opposed to its form. *Young* v. *Higbee*, 324 U.S. 204 (1944); *Bromley* v. *McCaughn*, 280 U.S. 124 (1929). In this respect, the true nature of a retroactive monetary award against the state will not be changed by pinning on it the label of equitable restitution. The respondent seeks *affirmative* relief from the State of Illinois in the form of direct payments from the Illinois General Revenue Fund.

Additionally, "when a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied." *Fleischman Distilling Corporation, et al*, v. *Maier Brewing Company, et al*, 386 U.S. 714, 720 (1967) citing *Phillip* v. *Nock*, 17 Wall 460 (1873); *Tessee* v. *Huntington*, 23 How. 2 (1860) cf. *Day* v. *Woodworth*, 13 How. 363 (1852).

be concluded that the Eleventh Amendment immunity is still existent, and the decision of the Seventh Circuit must be reversed.

Nevertheless, numerous Federal Courts have enforced judgments and decrees granting retroactive benefits presumably on an implied right theory in contravention of the Eleventh Amendment. The enforcement of such an alleged right is improper.

Under the circumstances, it is proper to look to all indicia of legislative intent before such an implied right can be established. *United States* v. *American Trucking Association*, 310 U.S. 534, 542-544 (1939); *United States* v. *Dickerson*, 310 U.S. 554, 562 (1939); and *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 463 (1967). However, there is nothing in the Social Security Act that expressly sanctions the right to retroactive assistance. In the absence of such express statutory language, the implied right would have to be inferred from the legislative intent of Congress. Committee Reports and Statements of committee members or their sponsors of legislation have been held to carry the most weight. *Wright* v. *Brinton Branch Bank*, 300 U.S. 440, 463-464 (1936); *United States* v. *United Mine Workers*, 330 U.S. 258, 278-280 (1946); *Duplex Printing Press Company* v. *Deering*, 254 U.S. 443, 474-475 (1920); *Chicago M. St. P. & P. R.* v. *Acme Fast Freight*, 336 U.S. 465, 472-477 (1948); *Mitchell* v. *Kentucky Finance Company*, 359, U.S. 290, 293, 295 (1959); *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612, 639-640 (1967).

An examination of the Committee Reports establishes an intent on the part of Congress to provide only for present need. There is no indication that Congress in-

tended to fund payments for past needs when payments were not received by welfare recipients as a result of error and/or omission on the part of State welfare officials, or as a result of the construction given a federal statute by a State welfare official.

For example, the House Ways and Means Committee on H.R. 7260, 74th Cong., 1st Sess., in Report Number 615, on the Social Security Act states as follows at page 3:

> "The need for legislation on the subject of Social Security is apparent at this time. On every hand the lack of such security is evidenced by human suffering, weakened morale, and increased public expenditures.
>
> This situation necessitates two complementary courses of action. We must relieve the *existing* distress and should devise measures to reduce destitution and dependency in the future. (Emphasis added).

Likewise, the Senate Finance Committee Report on H.R. 6635, 76th Cong., 1st Sess. (1939) on the Social Security Amendments Act of 1939, at page 5, made the following report on the intent of Congress:

> "The present bill aims to strengthen and extend the principles and objectives of the Social Security Act. The foundations of a permanent program have been laid and it seems wise to build upon the present structure.
>
> Old-age insurance, unemployment compensation, and public assistance are now accepted as permanent in our fabric of social services. The present will is designed to widen the scope and to improve the adequacy in the administration of these programs without altering their essential features. Benefits will continue to be payable as a matter of right to workers

covered by the insurance program; *aid will continue to be related to need under the assistance programs.*" (Emphasis Added.)

The same Senate Finance Committee reported at pages 30 and 31:

> "The purpose of all three assistance programs is further clarified by inserting the word 'needy' in the definitions of those who receive old-age assistance, aid to the blind, or aid to dependent children. A closely related clarifying amendment is applied to all three assistance titles and provides that the state, in determining need, must consider any other income and resources of individuals claiming assistance."

In 1955, the Democratic members of the Sub-Committee on Social Security of the Committee on Ways and Means, House of Representatives, issued a statement for release concurrently with the issuance of the Report of the Staff to the Chairman of the Sub-Committee on Social Security entitled "Social Security after 18 Years". On page 13 of that statement, the Democratic members voiced the following opinion:

> "We are concerned that there is still being urged in some quarters today inadequate, unsound, and ill-advised systems of non-contributory pensions for the aged. We believe that the old age assistance program should adequately provide for needy persons, but we do not believe that it is desirable or practical that arbitrary flat grants should be paid to all aged persons regardless of their need."

In that same year, 1955, the Staff reported to the Honorable Carl T. Curtis, Chairman of the Sub-Committee on Social Security for the Committee on Ways and Means, House of Representatives, 83rd Cong. 2nd Session, on page 54 under the title "The Purpose of Benefits of Both Types of Programs is to Deal with Need":

"A Ways and Means Report of 1939 defined the purpose of the benefit of public assistance and under title two as follows: 'Old-age insurance is to prevent future old-aged dependency. Old-age assistance is designed to relieve existing need.' "

Throughout the legislative history of the public assistance titles to the Social Security Act, there is language expressive of the intent of Congress to provide assistance so as to meet current needs. The review of the Committee Hearings, Committee Reports, and language of the statute manifests no intent to provide a right to retroactive assistance.

In conformity with this legislative history, your Petitioner adheres to the analysis of the Second Circuit Court of Appeals in *Rothstein* v. *Wyman*, 467 F. 2nd 426, (2nd Cir. 1972), cert. den. 41 L. Wk. 3527. The *Rothstein* opinion advances three basic reasons why retroactive assistance should not be granted. The first relates to the fundamental federal principle of satisfying present ascertain needs of impoverished persons.[7] Recognizing that "federal standards are designed to insure that those needs are equitably met . . ., the Court properly observed that the passage of time makes such payments compensatory rather than remedial since "the coincidence between ascertained and existing need becomes less clear."[8] In our case, more than five years have passed, and indeed the nature of the payment is in the nature of compensatory damages.

Not even the Respondents contend that payments in the form of retroactive assistance bear a reasonable relation-

(7) 467 F. 2d. at 234.

(8) 467 F. 2d. 235.

ship to the current needs of the Respondent class. Some of these payments might even be made to estates of decedents, or to individuals who no longer qualify for welfare assistance.

The second interest noted by the *Rothstein* Court was that of assuring proper use of federal funds. The Second Circuit found that the interest was not personal to welfare recipients since Congress provided the cut-off of federal funds as the appropriate remedy. The cause of action sounds in the government of the United States.

The third and most compelling reason, for implying a right was found to be the deterrence of wilfull State violations of federal laws.[9] None was found in the *Rothstein* context, nor may it be found in the Illinois context.

Under the circumstances, it is respectfully submitted that there is neither express intent on the part of Congress to afford welfare recipients the right of retroactive assistance nor is there sufficient evidence in the

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(9) The Respondents argue that there was a wilfull violation of federal law by Petitioner in light of the then existing orders in *Rodriguez* v. *Swank*, 318 F. Supp. 289 (N.D. Ill. 1970. Because the Petitioner adhered to a legal position in this case consistent with its theory on appeal in *Rodriguez* v. *Swank*, 403 U.S. 901 (1971), it does not necessarily follow that he proceeded in bad faith or wilfully violated federal law. Respondents suggest that failure to concede error is tantamount to bad faith or wilfull violation of federal law. It is respectfully submitted that it is improper to allege that the exhaustion of one's appellate remedies implies bad faith.

Such a characterization is contrary to the manifest weight of the record especially in the light of the fact that no testimonial evidence was ever produced by the Plaintiff-Respondent.

legislative history of the Social Security Act to imply such a right. Even if a right to retroactive assistance were implied, public policy would require the remedy not be fashioned except in the most extreme circumstances of bad faith. Moreover, the right cannot be enforced in the Federal Courts as a matter of law due to the jurisdictional bar of the Eleventh Amendment, and welfare recipients should necessarily resort to the appropriate forum.

(C) There Is No Implied Consent To Waiver Of Eleventh Amendment Immunity As A Result Of Illinois' Participation In The Federally Funded Public Assistance Program.

The Respondents urge in their brief in opposition to certiorari that Illinois impliedly consented to waive its Eleventh Amendment immunity as a result of participation in the federally funded public assistance program. According to the Seventh Circuit, if an independent analysis were available to it, the theory advanced in *Parden* v. *Terminal Railway*, 377 U.S. 184 (1964) would necessitate a finding that Illinois had waived its immunity.[10] The Seventh Circuit citing *Parden* at 995 found "that Illinois surely left the sphere that it is exclusively its own" when it began its participation in the Federal-State Welfare Program and thereby waived its immunity. However, the decision of the Seventh Circuit runs counter to this Court's decision in *Employees* v. *Missouri Department of Health and Welfare*, 36 L. Ed. 251, 256. There, Mr. Justice Douglas stated:

> " . . . *Parden* involved the Railroad business which Alabama operated for 'profit'. *Parden* was in the area

(10) 472 F. 2d 992-993.

where private persons and corporations normally run the enterprise.

. . . the dramatic circumstances of the *Parden* case, *which involved the rather isolated state activity can be put to one side.* We deal here with problems that may well implicate elevator operators, janitors, car-women, security guards, secretaries, and the like in every office building in a state's governmental hierarchy." (Emphasis added)

* * *

" . . . (W)e are reluctant to believe the Congress in pursuit of a harmonious federalism desired to treat the States so harshly. The policy of the act so far as the States are concerned is wholly served by allowing the delicate Federal-State relationship to be managed through the Secretary of Labor. It is true that, as the Court said in *Parden*, 'the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce. 377 U.S. at 191. *But we declined to extend Parden to cover every exercise by Congress of its Commerce Power, for the purpose of Congress to give force to the supremacy clause by lifting the sovereignty of the States, and putting the States on the same footing as other employees is not clear.*'" (Emphasis added)

No mention was made in the Seventh Circuit opinion about the governmental-proprietary distinction set forth in the *Employees* decision and in *Rothstein*, supra.

It is respectfully submitted that the opinion of the Seventh Circuit begs the question, when, without citations or authority it states that "Illinois surely left the sphere that is exclusively its own" when it began its participation in the federally assisted welfare program.

This departure from *Parden's* logic is fatal. The administration of the Welfare Program is a purely governmental function. It is no different than the administration of the Labor Laws, Mental Health Laws, Insurance Laws, or any other state statutory scheme.[11]

The limitations of *Ex Parte Young* cannot be extended to the recovery of monetary awards against the General Revenue Fund of the people of the State of Illinois. As stated earlier, the parameters of the holding in *Ex Parte Young* are squarely an issue in this case. The conflict between the Second Circuit and the decision below, essentially boils down to the question of how far the limitations of *Ex Parte Young* should be extended. The Second Circuit, in *Rothstein*, took a narrower view of *Ex Parte Young* than the Seventh Circuit, when it stated:

> "It is equally a part of the law of the Eleventh Amendment that, even though a State may not be named as a party defendant, any judgment declaring a liability which must be met from the public

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(11) The Seventh Circuit found that the individual welfare recipient's claim sounded in 42 U.S.C. Section 1983 and that jurisdiction vested in a District Court by way of 28 U.S.C. Section 1343 (3). Despite this finding of fact, it does not bring the facts within those of *Parden* where the statute in question provided a remedy explicitly and none had to be inferred from either the statute or its legislative history. 29 U.S.C. 216 (b). The Seventh Circuit finds nourishment for the implied right to retroactive assistance by way of 45 CFR Section 205.10 (b) (2) (3) that provides for HEW's participation in retroactive payments awarded by courts to welfare recipients. See footnote 15, 472 F. 2d, at 995. However, such a regulation is only the executive branch's interpretation afforded to the congressional enactment.

> funds of the State does come within the reach of the Eleventh Amendment; and the Court will, absent the State's consent be deemed without jurisdiction to enter such judgment." 467 F. 2d. 236.

Your petitioner relied upon the same authorities cited in the Second Circuit opinion. They were *Ford Motor Company* v. *Treasury Department*, 323 U.S. 459 (1944); *Kennicott Copper Corporation* v. *State Commission*, 327 U.S. 573 (1946) and *Great Northern Life Insurance* v. *Reed*, 322 U.S. 47 (1944). All these cases were brought as original actions to collect unconstitutional State statutory assessments. Each was brought in a federal forum. However, the Seventh Circuit chose to restrict the cases to their facts. See 472 F. 2d. 992. The Seventh Circuit suggested that cases such as these should be heard in state courts because of the impact on local finances. For this proposition it cited from Mr. Justice Reed in *Kennicott Copper Corporation* v. *State Tax Commission*, 327 U.S. 573-577 (1948). The quote from Mr. Justice Reed appearing at 472 F. 2d 992 reads:

> "These cases declare that the rule that clear declaration of the State's consent to suit against itself in the Federal Court on fiscal claims is required. The reason underlying the rule, which is discussed at length in the *Read* and *Ford* cases, is the right of a State to reserve for its Courts the primary consideration and decision of its own tax litigation because of the direct impact of such litigation upon its finances. (Citations omitted)."

This rationale, however, militates in favor of the proposition that a suit seeking a monetary award from the fisc of a local body politic is a suit against the State barred by the Eleventh Amendment.

Additionally, the Seventh Circuit's efforts to restrict the foregoing authorities to their facts runs expressly counter to the language of the authorities themselves. For example, in *Ford Motor Company* v. *Department of Treasury, State of Indiana*, 323 U.S. 459, at page 464, (1944) the Court states:

> "(W)hen the action is in essence one for recovery of money from the State, the State is the real, substantive party in interest and is entitled to invoke its sovereign immunity from suit even though individual officers are nominal defendants."

This language is also acknowledged in the later case of *Georgia* v. *Redwine*, 342 U.S. 299 (1952). In *Redwine*, the Court, relying on *Ex parte Young*, held that a lower federal court had jurisdiction to enjoin an unconstitutional assessment of state taxes because "a suit to restrain unconstitutional action threatened by an individual who was an officer is not a suit against the state." 342 U.S. 299, 304 (1952). However, the Court drew a necessary distinction between the seeking of affirmative action as opposed to prohibitory action. In speaking about affirmative action, it is apparent that the Court was referring to payments from the fisc of the body politic.

A strong inference can be drawn from *Redwine* that had a request for "affirmative action" been made, the Court would have held that it was, as in *Ford Motor Company* and *Great Northern*, a suit against the State prohibited by the Eleventh Amendment. Hence, despite the language of the opinion below, there is a line of cases which supports the proposition that *Ex Parte Young* does not apply to suits seeking monetary relief against the General Revenue Fund of the body politic.

The Seventh Circuit went one step further; it severely criticized the logic of your petitioner and the *Rothstein* court when it observed that an injunction compelling future conformity has as great an impact upon the fisc of a body politic as a mandatory injunction compelling the payment of retroactive assistance. Prospective relief, it was observed, was as much a liability which must be met from public funds of the State as retroactive relief would be. Petitioner's logic was then questioned by the court as being inconsistent for objecting to one and not the other. Respondents also echo this theory. The Respondent's logic is defective. First, Illinois has the option of either complying or discontinuing its affiliation with the federally assisted welfare program when confronted with a declaratory judgment or mandatory injunction compelling future conformity. These facts are distinguishable from those when a State is enjoined to pay a retroactive monetary award. It must conform with that order whether or not it continues to elect to be affiliated with the federal program. Illinois acknowledges that it would be a difficult political decision to make. Notwithstanding, the legal right to continue or discontinue participation in the federally assisted program is available to the body politic. Hence, action to conform is a voluntary consent in waiver.

But, Respondents urge that the law of Sovereign Immunity has been abolished in the state of Illinois, and the State of Illinois can not raise the defense as a matter of law. Respondents in their brief in opposition cite several federal authorities that hold that it is necessary to look to the law of the local forum in determining whether an action is against the body politic. *Arrowjet General Cor-*

poration v. *Askew*, 452 F. 2d 819, 828-829 [5th Cir. (1971)]; *Brennan* v. *University of Kansas*, 451 F. 2d 1287, [10th Cir. (1971)]. However, they mislead the Court, when their brief states that the Doctrine of Sovereign Immunity is abolished in the State of Illinois. Respondent's brief states at page 6:

> "Moreover, Section 4, Article 13 of the Illinois Constitution abolishes Sovereign Immunity except as provided by law, and it would be anomalous, to say the least, for the Doctrine of Sovereign Immunity embodying the Eleventh Amendment to offer protection to the State of Illinois, where the constitution of the sovereign has abolished the doctrine. Thus, under Illinois law the Eleventh Amendment issue is not properly joined in this case."

This self serving statement is false and misleading.

A careful examination of the history of the Doctrine of Sovereign Immunity establishes its continued existence and viability in the State of Illinois. In this respect, it is necessary to recall that this suit was commenced in January of 1971, and the retroactive monetary award covers the period of July 1, 1968 through the date that the preliminary injunction was entered compelling conformity with the 45 and 60 day rule.

In 1970, the people of the State of Illinois ratified a new Constitution. At the time this suit was filed Illinois was functioning under the Constitution of 1870. On January 1, 1972, Article 13, Section 4, of the Illinois Constitution, the section upon which the Respondents rely, became self operative.

Article IV Section 26 of the Illinois Constitution of 1870 provided:

> "The State of Illinois shall not be made a defendant in any court of law or equity."

Recognizing that persons might have legitimate claims against the State of Illinois which ought to be paid, the Illinois General Assembly passed a Court of Claims Act, Illinois Revised Statutes, Chapter 37, Section 427, et seq. pursuant to the grant of authority contained in the 1870 Constitution. The effect of that act was to provide that persons with certain types of claims against the State of Illinois, which would otherwise be barred by Article IV, Section 26, could be brought in the Court of Claims. Decisions made by the Court of Claims are mere recommendations to the State Legislature, which must take affirmative action to appropriate funds to pay for claims found by the Court of Claims to be just.[12]

Article 13, Section IV, of the Illinois Constitution of 1970 (effective January 1, 1972) altered the old rule of Sovereign Immunity by providing:

> "Except as the General Assembly may provide by law, Sovereign Immunity in this state is abolished."

The General Assembly then acted to restore Sovereign Immunity by enacting Section 801, Chapter 127, Illinois Revised Statutes, 1971. The act became effective on January 1, 1972 (the same date as the 1970 Constitution took effect). The act provides:

> "Except as provided in 'An Act To Create the Court of Claims, . . .' filed July 17, 1945, as amended, the

---

[12] The establishment of the Court of Claims by the Legislature under the 1870 Constitution was upheld in the clearest terms in *Edelen* v. *Hogsett*, 44 Ill. 2d 215, 254 N.E. 2d 435. In *Edelen*, the Court dismissed the cause on the basis of the lack of standing of plaintiffs since there was no effort to seek relief in the Court of Claims. Plaintiffs asked the Court to invoke the rule of *Huckaba* v. *Cox*, 14 Ill. 2d 126, 150 N.E. 2d 832 (1958) to declare the Court of Claims Act unconstitutional.

> State of Illinois shall not be made a defendant or party in any court."

Section 801 restored Sovereign Immunity in Illinois but also reaffirmed the rights of persons to bring claims against the State in the Court of Claims. It is respectfully submitted that the welfare recipient's rights, if any, should be enforced in the Illinois Court of Claims.

In applying the Doctrine of Sovereign Immunity to a class of welfare recipients seeking the payment of a monetary award from the Illinois General Revenue Fund, the Illinois Appellate Court has found that it was a bar to the pressing of such claims in Illinois courts of general jurisdiction. In *Chicago Welfare Rights Organization* v. *Weaver*, 5 Ill. App. 3rd 655, 284 N.E. 2d 20 (1972), Presiding Justice Dieringer states:

> "The plaintiffs argue that the immunity of the State from suit does not extend to a State officer where he is enforcing an unconstitutional statute or is proceeding in violation of law. In *Schwing* v. *Miles*, 367 Ill. 436, 11 N.E. 2d 944 (1937), the court said:
>
> > It is settled that a suit against the department is a suit against the State that will not lie. On the other hand, where the action at law or suit in equity is maintained against a State officer or the director of a department on the ground that, while claiming to act for the State he violates or invades the personal property rights of the plaintiff under an unconstitutional act, or under an assumption of authority which he does not have, such suit is not against the State.
>
> But this general rule should now be interpreted to be modified by the rule of *Edelen* v. *Hogsett*, 44 Ill. 2nd 215, 254 N.E. 2d 435 (1969) . . . In *Edelen*, the court made clear that section 26 had been modified by the General Assembly in the Court of Claims Act. Section

439, Chapter 37 of the Illinois Revised Statutes. That act provides for the Court of Claims to have exclusive jurisdiction of certain causes of action. Section (A) is pertinent to this litigation:

> The court shall have exclusive jurisdiction to hear and determine the following matters:
>
> (a) All claims against the State founded upon any law of the State of Illinois or upon any regulation thereunder by an executive or administrative officer or agency, . . ."

The Illinois Appellate Court found as a matter of law in *Chicago Welfare Rights* that the suit was barred by the Doctrine of Sovereign Immunity, and directed the plaintiffs to file their claims in the Illinois Court of Claims. Accordingly Illinois Courts have clearly found that retroactive assistance is barred by the Doctrine of Sovereign Immunity from being aired in Illinois Courts of general jurisdiction.

In reversing the Trial Court the Appellate Court took due and proper notice that the welfare appropriation of the Illinois Department of Public Aid had lapsed. Additionally, it found that the chancellor's order presented severe problems in the orderly administration of the welfare program. Clearly, the Director of the Illinois Department of Public Aid could not request the Auditor of Public Accounts to execute a warrant, or the Treasurer to pay a warrant that issued against a lapsed appropriation. Thus, the Appellate Court found that a current appropriation could not be encumbered by prior years' obligations. This is the purpose of the Court of Claims in Illinois. The Court of Claims provides the procedure for an orderly matching of governmental costs and revenues in the delicate budgetary process of the body politic. Without its function

being performed, Illinois is faced with the exhaustion of current appropriations and tax monies by encumbrances that bear no reasonable relationship in amount or purpose to that legislated by the General Assembly. Public policy and sound fiscal management require that the Illinois General Assembly be given an opportunity to create a separate appropriation for Court of Claims judgments. Using this procedure, the General Assembly and the Executive Branch of Government are able to allocate the limited tax funds of the State.

There is no justifiable rationale for encumbering present year appropriations for the alleged obligation of past years. This practice may lead to the bankruptcy of the State or the exhaustion of available tax revenues. Hence, the Appellate Court acted properly in preserving the orderly budgetary process of Illinois government. Obviously, the State cannot be run like a business. State government must be permitted to match current costs with current anticipated revenue. This process would be destroyed if the courts were to be permitted to place monetary awards against the General Revenue Fund for alleged obligations of past years. It is this very aspect of interference with State budgetary processes which is referred to in *Rothstein,* supra, and *Employees* v. *Missouri Department of Health and Welfare,* in which the delicate balance in federal and State relations, and the doctrine of comity were discussed. Furthermore, there is no way the District Court could have enforced its order except through execution upon the Illinois General Revenue fund; or, if exhausted, compelling the Executive Branch to seek or the Legislature to enact an appropriation from available tax revenues. Hence, the District Court would have been put in the anomalous position of having to order the General Assembly to enact legislation or face contempt—an order which

would be clearly unconstitutional as being a contravention of the Eleventh Amendment to the extent that the Federal Court performed the legislative and executive functions of the body politic. *Louisiana* v. *Jumel,* 107 U.S. 711 (1883); *Hagood* v. *Southern,* 117 U.S. 52 (1886); *North Carolina* v. *Temple,* 134 U.S. 22 (1890); and also see the dicta in *Larson* v. *Domestic and Foreign Commerce Corporation,* 337 U.S. 682 (1949). In each of the aforegoing instances affirmative relief was found to contravene the Eleventh Amendment prohibition.

II.

For purposes of convenience and brevity your petitioners adopt and incorporate herein by reference the following arguments printed in its Petition for Certiorari, and rely and rest upon the authorities and law cited therein. They are: (a) under standards enunciated by the Court for determining the effect to be given a judgment, the facts in the instant case mandate prospective application, and (b) federal regulations relied upon by plaintiff are inconsistent with applicable provisions of the Social Security Act.

CONCLUSION

For the reasons herein urged, it is prayed that the Order and Judgment of the District Court, and the Opinion of the Seventh Circuit affirming that Judgment, be reversed.

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street,
Chicago, Illinois,

DONALD S. CARNOW,
Special Assistant Attorney General,
300 West Washington Street,
Chicago, Illinois,

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OCT 19 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1410

JOEL EDELMAN, Director of Illinois Department of Public Aid, and Sucessor to EDWARD WEAVER, Former Director of Public Aid,

Petitioner,

—v.—

JOHN JORDAN, *et al.*,

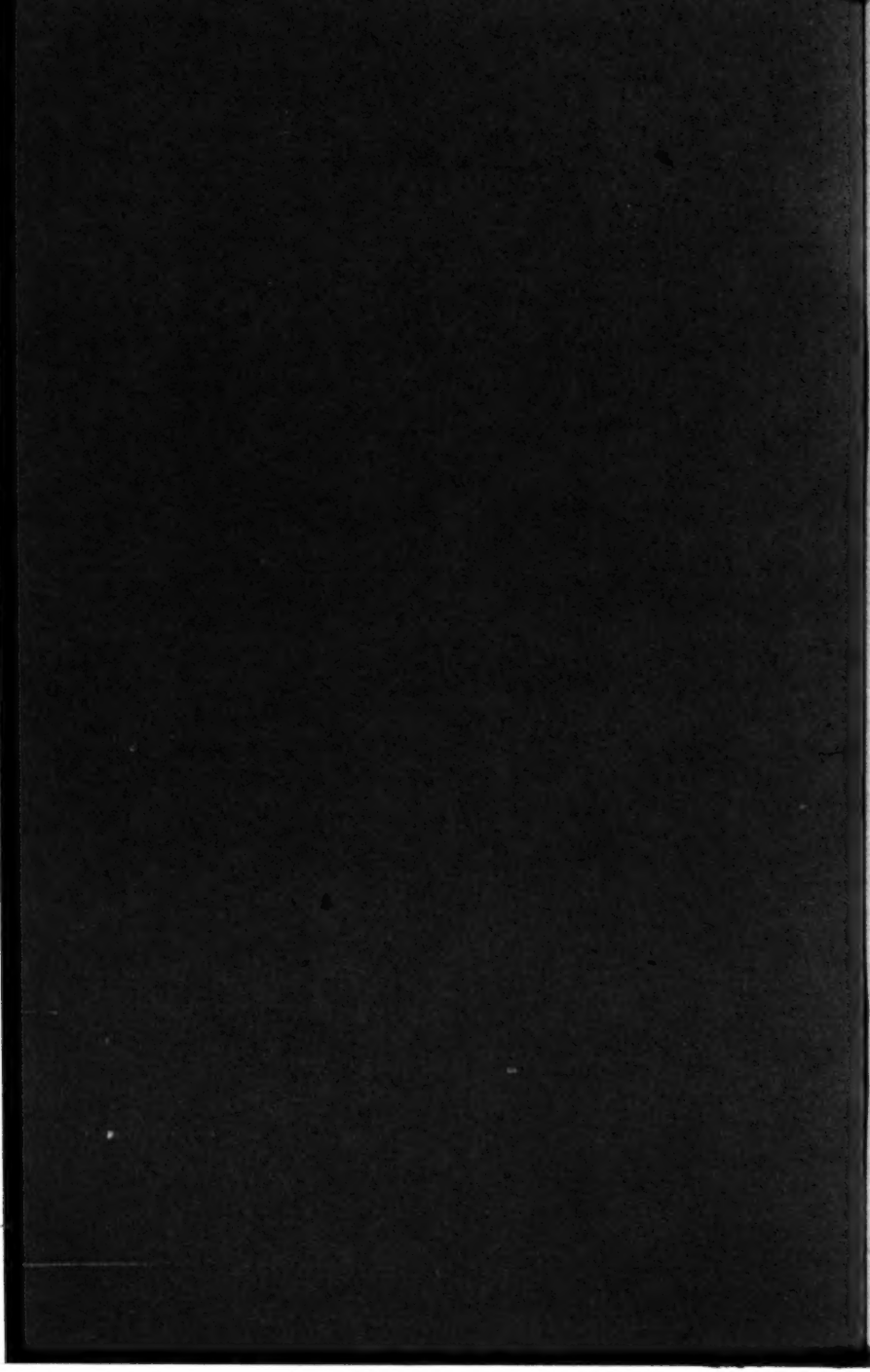
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* FOR NLSP CENTER ON SOCIAL WELFARE POLICY AND LAW, INC.

NANCY DUFF LEVY
HENRY A. FREEDMAN
NLSP Center on Social
Welfare Policy and Law, Inc.
25 West 43rd Street
New York, New York 10036
(212) 354-7670

Attorneys for Amicus



INDEX

PAGE

Summary of Argument 5

Statement of the Case 7

I. The equitable remedy of restitution is properly employed to enjoin the wrongful withholding of public assistance benefits 9

A. *Unless Otherwise Provided by Statute, All the Inherent Equitable Powers of the Federal Courts Are Available for the Proper and Complete Exercise of That Jurisdiction* 9

B. *Congress Has Expressed No Intent to Limit the Federal Courts' Inherent Equitable Powers to Order Restitution of Welfare Benefits Unlawfully Withheld* 14

II. Where, as in this case, equitable restitution of public assistance benefits wrongfully withheld restores the situation to that which would have been but for the statutory violation in question, and furthers the congressional purposes of the Social Security Act, there is little room for the exercise of discretion not to order such relief 20

III. Conclusion 49

TABLE OF AUTHORITIES

PAGE

CASES:

Alexander v. *Weaver*, 345 F. Supp. 666 (N.D. Ill. 1972) 17, 21, 32

Arkadelphia Milling Co. v. *St. Louis Southwestern Ry. Co.*, 249 U.S. 134 (1918) 11

Barnett v. *Lindsey*, 319 F. Supp. 610 (D. Utah 1970) 26

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Board of Social Welfare v. *Los Angeles Co.*, 28 Cal. 2d 90, 162 P.2d 630 (1945) 22, 32

Borkman v. *Commissioner of Social Welfare*, 128 Vt. 561, —— A.2d 790 (1970) 26

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Burk Builders, Inc. v. *Wirtz*, 355 F.2d 451 (5th Cir. 1970) 24

Butz v. *Carter*, 479 F.2d 1084 (3rd Cir. 1973) 23

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Damico v. *California*, 389 U.S. 416 (1967) 36

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PAGE

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Hodgson v. *Taylor*, 439 F.2d 288 (8th Cir. 1971) 13, 29

Jefferson v. *Hackney*, 406 U.S. 535 (1972) 38
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Jordan v. *Weaver*, 472 F.2d 985 (7th Cir. 1973), *cert. granted*, 93 St. Ct. 2776 (1973) 8, 21, 23, 29, 46

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King v. *Smith*, 392 U.S. 309 (1968) 14, 16, 22, 32, 34

Lewis v. *Martin*, 397 U.S. 552 (1970) 26
Lopez v. *Wyman*, —— F. Supp. ——, No. 1971-308 (Aug. 9, 1971), *aff'd*, 404 U.S. 1055 (1972) 25

Machado v. *Hackney*, 266 F. Supp. 644 (W.D. Tex. 1969) 31
McFerren v. *County Board of Education of Fayette, Tennessee*, 455 F.2d 199 (6th Cir. 1972) 13
Mitchell v. *DeMario Jewelry, Inc.*, 361 U.S. 296 (1959) 6, 9, 12, 13, 14, 16, 20, 28, 48
Morrison v. *Vincent*, 300 F. Supp. 541 (S.D.W.Va. 1969) 26

PAGE

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Palmer v. *Thompson*, 403 U.S. 217 (1971) 25
Porter v. *Warner Holding Co.*, 327 U.S. 395 (1947) 9, 10, 11, 12, 13, 14, 16, 21, 27

Rivera v. *Dunn*, 329 F. Supp. 554 (D. Conn. 1971) 26
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Rosado v. *Wyman*, 414 F.2d 170 (2nd Cir. 1969), 397 U.S. 397 (1970) 15, 16, 17, 18, 19, 22, 27, 28, 38
Rosado v. *Wyman* (on remand), 322 F. Supp. 1173 (E.D.N.Y. 1970), 437 F.2d 619 (2nd Cir. 1970), *aff'd*, 402 U.S. 991 (1971) 18, 19, 42
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Schechter Poultry Co. v. *United States*, 295 U.S. 495 (1935) 33
Shapiro v. *Thompson*, 270 F. Supp. 331 (D. Conn. 1967), *aff'd*, 394 U.S. 618 (1969) 18, 25, 26, 33
Schultz v. *Mistletoe Express Service, Inc.*, 434 F.2d 1267 (10th Cir. 1970) 13, 24, 27
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PAGE

Shultz v. *Parke*, 413 F.2d 1364 (5th Cir. 1969) 13, 24
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Stoddard v. *Fisher*, 330 F. Supp. 566 (D. Me. 1971) 31
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7 U.S.C. §2019(b), (f) 23
29 U.S.C. §217 13
42 U.S.C. §301 7
42 U.S.C. §302(a)(8) 34
42 U.S.C. §602(a)(10) 34
42 U.S.C. §602(a)(23) 18, 19
42 U.S.C. §1201 7
42 U.S.C. §1202(a)(11) 34

PAGE

42 U.S.C. §1316 15
42 U.S.C. §1351 7
42 U.S.C. §1352(a)(10) 34
42 U.S.C. §1381 ..... 7, 14, 15
42 U.S.C. §1382 14
42 U.S.C. §1382(a)(1) 34
42 U.S.C. §1382(a)(3) 34
42 U.S.C. §1382(a)(4) 33
42 U.S.C. §1382(a)(7) 34
42 U.S.C. §1382(a)(8) 7, 20, 34
42 U.S.C. §1383 ..... 14, 15, 34
42 U.S.C. §1384 14
42 U.S.C. §1386 34
42 U.S.C. §1396a 41
42 U.S.C. §1983 ..... 13, 20, 36
Civil Rights Act of 1964, Title VII 14
Emergency Price Control Act 11
Fair Labor Standards Act 12, 13, 24
Social Security Act
§402(a)(23) 18, 19

Federal Regulations:

45 C.F.R. §205.10(b)(2) 35
45 C.F.R. §206.10 ..... 5, 35, 47
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45 C.F.R. §205.10(a)(13) 35
45 C.F.R. §205.10(a)(18) 35
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PAGE

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PAGE

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1 Pomeroy's Equity Jurisprudence §236(a) 10
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United States Constitution, Eleventh Amendment 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1410

JOEL EDELMAN, Director of Illinois Department of Public Aid, and Sucessor to EDWARD WEAVER, Former Director of Public Aid,

Petitioner,

—v.—

JOHN JORDAN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND STATEMENT OF INTEREST OF *AMICUS CURIAE*

The NLSP Center on Social Welfare Policy and Law, Inc. respectfully moves the Court for permission to file the attached brief *amicus curiae.*

The NLSP Center on Social Welfare Policy and Law, Inc. is the specialized welfare law resource of the Legal Services Program of the Office of Economic Opportunity. The Center undertakes research pertaining to the legal rights of welfare beneficiaries and supports OEO-funded legal service programs through education and assistance in the preparation of important litigation. Since its inception in 1965 Center attorneys have represented parties, and the Center has participated as *amicus curiae,* in this Court

and the lower courts in cases involving all facets of welfare law. Specifically, the Center participated as *amicus* in this Court in *King* v. *Smith*, 392 U.S. 309 (1968); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Wheeler* v. *Montgomery*, 397 U.S. 280 (1970); *Dandridge* v. *Williams*, 397 U.S. 471 (1970); and *Lewis* v. *Martin*, 397 U.S. 552 (1970), and Center attorneys represented welfare clients before the Court in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Rosado* v. *Wyman*, 397 U.S. 397 (1970); and *Jefferson* v. *Hackney*, 406 U.S. 535 (1972).

The NLSP Center on Social Welfare Policy and Law, Inc. seeks leave to file this brief *amicus curiae* for the following reasons. The Center believes that a reversal by this Court of the decision below with respect to the award of benefits wrongfully withheld will substantially diminish the value to needy individuals of the right to enforce federal law against state officials confirmed by this Court in *Rosado* v. *Wyman, supra*. If retroactive benefits are barred, officials responding to political or other pressures can refuse to provide benefits mandated by Congress, certain that such benefits will never have to be paid in the future. Such a result, the Center believes, is repugnant to the principle of statutory entitlement established by this Court in *King* v. *Smith, supra, Townsend* v. *Swank, supra,* and *Carleson* v. *Remillard*, 406 U.S. 598 (1972), and the traditional equitable doctrines concerning restitution.

Amicus wishes to assure that this Court is presented with a discussion of the many factors which might affect the awarding of retroactive benefits in public assistance cases, including those which may differ from the instant case and may therefore not be presented by counsel for respondents. *Amicus* has unique familiarity with the many types of

cases concerning public assistance which come before the federal courts, and the variety of problems they pose. This brief is not addressed to the questions related to sovereign immunity which will no doubt be briefed by respondents, since resolution of those questions is not likely to turn upon the particular facts of this case.

Amicus requested consent for the filing of this brief from counsel for both parties by letters of August 24, 1973. Permission was received from counsel for respondents. Counsel for petitioners, however, failed to respond to our letter and subsequent telephone calls until October 17, 1973, at which time consent was denied.

WHEREFORE, movants pray that the attached brief *amicus curiae* be permitted to be filed with the Court.

Respectfully submitted,

NANCY DUFF LEVY
HENRY A. FREEDMAN
NLSP Center on Social
Welfare Policy and Law, Inc.
25 West 43rd Street
New York, New York 10036

IN THE

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OCTOBER TERM, 1972

No. 72-1410

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Petitioner,

—v.—

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE*

Summary of Argument

Pursuant to valid federal regulations, decisions on eligibility for public assistance benefits must be rendered within certain mandatory time standards. 45 C.F.R. §206.10. Where such decisions are not timely made a federal court may properly, pursuant to its inherent equitable jurisdiction, order the restitution of welfare benefits unlawfully withheld.

Thus all of the inherent equitable powers of the federal courts are, under prior decisions of this Court, available for the proper exercise of equity jurisdiction, unless otherwise clearly provided by statute. The reasons for this are

apparent from the nature of equity jurisdiction, which has always been to secure complete justice. In this case Congress has not limited this jurisdiction, and therefore such a remedy was available to the district court.

The exercise of equity jurisdiction is of course always within the sound discretion of the district court. Where, as here, however, that remedy restores persons to the situation they would have been in but for the violation in question, and furthers congressional purposes, "there is doubtless little room for the exercise of discretion not to order reimbursement." *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288 (1947).

Restitution of public assistance benefits wrongfully withheld clearly restores injured recipients to the position they would have been in had the law not been violated. Similarly, restitution generally furthers the congressional purposes of deterring noncompliance with the Social Security Act, insuring the proper use of federal funds, and providing recipients with the statutory entitlement for which they have unquestioned need. Although each case must be considered on its own facts, restitution clearly furthers these objectives in this case, and therefore was properly ordered by the district court.

Statement of the Case

This case involves the rights of indigent aged, blind and disabled persons in the State of Illinois to receive desperately needed public assistance benefits "with reasonable promptness," as required by Title XVI of the Social Security Act, 42 U.S.C. §1382(a)(8).[1] Respondent John Jordan is a mentally retarded sixty-one-year-old male whose application for disability benefits was not acted on by the state welfare department for almost four months, despite the requirement of the federal regulation implementing §1382(a)(8), *supra*, that

> "[p]rompt action will be taken on each application, within reasonable State-established time standards (which, effective July 1, 1968, will not exceed 30 days in AFDC [Aid to Families with Dependent Children], OAA, and AB, and as to aged and blind in AABD, and 60 days in APTD and as to disabled in AABD)." Federal Handbook of Public Assistance Administration, Pt. IV, §2200(b)(3).[2]

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[1] The category of assistance involved in this case is Aid to the Aged, Blind or Disabled (AABD), a combined program of assistance under which, pursuant to 42 U.S.C. §1381 *et seq.*, 19 states have elected to cover individuals who might otherwise be covered in separate programs of Aid to the Aged (OAA), 42 U.S.C. §301 *et seq.*, Aid to the Blind (AB), 42 U.S.C. §1201 *et seq.*, or Aid to the Permanently and Totally Disabled (APTD), 42 U.S.C. §1351 *et seq.* The particular statutory provision at issue here, 42 U.S.C. §1382(a)(8) provides that "[a] State plan for aid to the aged, blind, or disabled, or for aid to the aged, blind or disabled and medical assistance for the aged, must . . . provide that all individuals wishing to make application for aid or assistance under the plan shall have opportunity to do so, and that such aid or assistance shall be furnished with reasonable promptness to all eligible individuals."

[2] The above regulation was codified in the Code of Federal Regulations on February 27, 1971, after this case was filed. 45 C.F.R.

As is more fully set forth in the Brief for Respondents, Mr. Jordan filed this action on January 12, 1971, subsequent to a three-judge court ruling in *Rodriguez* v. *Swank*, 318 F. Supp. 289 (N.D. Ill. 1970), *aff'd*, 403 U.S. 901 (1971), which had held invalid Illinois' violation of the time standards set forth above in the Aid to Families with Dependent Children program. Mr. Jordan's complaint sought to enjoin Illinois' violation of federal requirements for the processing of AABD applications and to obtain restitution of all AABD benefits wrongfully withheld as a result of this violation. The district court granted summary judgment with respect to these claims, enjoined Illinois' noncompliance with the federal time standards for processing applications, and ordered the defendant to release all AABD benefits wrongfully withheld from those AABD applicants whose applications had not been processed in accordance with those time standards.[3] The Court of Appeals for the Seventh Circuit affirmed, *Jordan* v. *Weaver*, 472 F.2d 985 (7th Cir. 1973),[4] and this Court granted certiorari on June 11, 1973. 93 S. Ct. 2776 (1973).[5]

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§206.10(a)(3). Effective October 15, 1973, the federal time standards in AFDC, OAA, AB and as to the aged and blind in AABD are 45 days. 38 Fed. Reg. 22009 (Aug. 15, 1973).

[3] The period covered was from July 1, 1968, the effective date of the federal regulation, to April 16, 1971, the date on which the district court preliminarily enjoined the enforcement of the illegal state regulation. There is a typographical error in the judgment insofar as it reads April 16, 197"2".

[4] Other issues raised on cross-appeal were rejected by the Seventh Circuit. Those issues are not before this Court.

[5] On July 19, 1973, Mr. Justice Rehnquist denied petitioner's application for a stay with respect to the prospective relief but granted a stay of the provisions relating to restitution. Application A-51 (July 19, 1973).

The judgment of the Court of Appeals is in all aspects correct and must be affirmed. More particularly, it is the position of this *amicus* that the federal "reasonable promptness" regulations are valid, and that the restoration of benefits ordered by the district court is not barred by the Eleventh Amendment. These questions, however, are not addressed here. Rather their favorable resolution is, for purposes of this brief, assumed, leaving the question of the propriety of the award of retroactive benefits. This *amicus* asserts that such an award is an entirely proper exercise of equitable jurisdiction in this case, and in public assistance cases generally.

ARGUMENT

I.

The equitable remedy of restitution is properly employed to enjoin the wrongful withholding of public assistance benefits.

A. *Unless Otherwise Provided by Statute, All the Inherent Equitable Powers of the Federal Courts Are Available for the Proper and Complete Exercise of That Jurisdiction.*

The implication by the lower courts in this case of a remedy in the form of an award of retroactive benefits is entirely consistent with the equitable authority of federal courts generally to imply all appropriate remedies. Thus, as this Court's decisions in *Porter* v. *Warner Holding Co.*, 327 U.S. 395 (1947), and *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288 (1959), make clear, unless otherwise provided by statute, all of the inherent equitable powers of the federal courts are available for the proper and complete exer-

cise of equity jurisdiction, and federal courts may give whatever relief necessary under the circumstances:

> "The comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principle of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.' *Brown* v. *Swann*, 10 Pet. 497." *Porter, supra*, at 398.

See also *Swann* v. *Charlotte Mecklenberg Board of Education*, 402 U.S. 1 (1971).

The reasons for this are apparent from the nature of equity jurisdiction, which has always been to secure complete justice. 1 Pomeroy's Equity Jurisprudence §§231, 236(a); *Porter* v. *Warner Holding Co., supra*, at 398. Courts may thus, pursuant to their general equity jurisdiction, not only order compliance with congressional acts in the future but may also compel by means of an order for restitution a return to the situation which would have existed had the congressional will not been violated. *Id.*, at 402; 4 Pomeroy's Equity Jurisprudence §1359. Without such power equity could not secure "complete rather than truncated justice." *Porter, supra*, at 398.

The purpose of the particular equitable remedy of restitution is to secure for the plaintiff that to which she or he is justly and in good conscience entitled, and to prevent the unjust enrichment of the defendant. Restatement of the Law, Restitution 1 (1937). Restitution is thus usually thought

of as a remedy by which the defendant is made "to disgorge ill-gotten gains or to restore the status quo, or to accomplish both objectives." 5 Moore's Federal Practice §38.24 (a) at p. 190.5. If the amount of the defendant's gain can be measured with some certainty or is easily ascertainable, recovery or repayment in restitution is proper. *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.*, 249 U.S. 134 (1918); 7 Moore's Federal Practice §65.10 at pp. 65-98. Restitution is thus traditionally employed to prevent the defendant from profiting from his or her illegal action at the expense of the injured party. As such it is "within the recognized power and within the highest tradition of a court of equity." *Porter* v. *Warner Holding Co., supra,* at 402.

Porter involved the power of a federal court to order restitution of rents collected by a landlord in excess of the maximums permissible under the Emergency Price Control Act. The lower court had held that there was no authority under the statute to order restitution. This Court reversed, enunciating the rule quoted above that *unless* contrary legislative intent could be demonstrated, all the inherent equitable powers of the district courts are available for the proper exercise of equity jurisdiction.[6] The Court thereafter specifically found the particular equitable remedy sought in that case—restitution of back rents—a proper exercise of equitable discretion under two theories—as necessary to restore ill-gotten gains (the traditional criterion for restitution) and as necessary to advance the statutory purpose of the Emergency Price Control Act:

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[6] Even a statutorily-authorized action for damages was found not to be intended by Congress "to whittle down" the court's equitable jurisdiction to order restitution. *Porter,* at 402.

"(1) It may be considered as an equitable adjunct to an injunction decree. Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief. . . . [w]here as here, the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief . . .

[and]

(2) It may be considered as an order appropriate and necessary to enforce compliance with the Act. . . . The inherent equitable jurisdiction which is thus called into play clearly authorizes a court, in its discretion, to decree restitution of excessive charges in order to give effect to the policy of Congress. And it is not unreasonable for a court to conclude that such a restitution order is appropriate and necessary to enforce compliance with the Act and to give effect to its purposes. Future compliance may be more definitely assured if one is compelled to restore one's illegal gains." *Id.*, at 399-400 (citations omitted).

See also *United States* v. *Moore*, 340 U.S. 616 (1951).

Mitchell v. *DeMario Jewelry, Inc.*, *supra*, made clear that *Porter* does not limit a court's authority to grant equitable restitution to situations where either express or implied congressional intent can be discerned. *Mitchell* involved a federal court's authority to order restitution of lost wages to employees discharged in violation of the Fair Labor

Standards Act. This Court reiterated the principles set forth in *Porter*, and held, despite statutory language which provided that no court should have jurisdiction to "order the payment to employees of unpaid minimum wages or unpaid overtime compensation," 29 U.S.C. §217, that Congress had not intended to limit the courts' traditional equitable powers. The legislative history of §217 was employed, as in *Porter*, merely to confirm that result. *Mitchell*, at 292. Restitution of lost pay was then held to be proper in order 1) to restore the employees to the condition they would have enjoyed had the employer not violated the Act, and 2) to effectuate the purposes of the Act by encouraging employees to report violations of the Act without risk of losing their entire pay during the period necessary to obtain reinstatement.

The thrust of these cases—and of the lower federal court cases which have ordered restitution of overcharges and/or wages which would have been paid but for the statutory violations in question, see, e.g., *Hodgson* v. *Taylor*, 439 F.2d 288 (8th Cir. 1971); *Schultz* v. *Mistletoe Express Service, Inc.*, 434 F.2d 1267 (10th Cir. 1970); *Wirtz* v. *Milton J. Wershow Co.*, 416 F.2d 1071 (9th Cir. 1969); *Shultz* v. *Parke*, 413 F.2d 1364 (5th Cir. 1969);[7] *Harkness* v. *Sweeney Independent School District*, 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971); *McFerren* v. *County Board of Education of Fayette, Tennessee*, 455 F.2d 199 (6th Cir. 1972); *Smith* v. *Hampton Training School for Nurses*, 360 F.2d 577 (4th Cir. 1966);[8] *Robinson* v. *Lorillard*

[7] These four cases involve claims for back pay under the Fair Labor Standards Act.

[8] These three cases involve claims for back pay under 42 U.S.C. §1983.

Corporation, 444 F.2d 791 (4th Cir. 1971), *cert. denied*, 404 U.S. 1006 (1971); *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969);[9] is that unless specifically precluded by statute, equitable restitution is within the power of the federal courts and is properly ordered to restore ill-gotten gains and advance the statutory purpose.

B. *Congress Has Expressed No Intent to Limit the Federal Courts' Inherent Equitable Powers to Order Restitution of Welfare Benefits Unlawfully Withheld.*

The authority of the federal courts to grant equitable restitution of public assistance benefits unlawfully withheld is squarely within the principles enunciated in *Porter* and *Mitchell*. There are no provisions of the Social Security Act which in any way restrict the courts' traditional equity powers to afford "complete rather than truncated justice." *Porter*, at 398. In the absence of any such limitation, the full scope of equity jurisdiction is to be recognized and applied.

The general topography of the federal categorical assistance programs is well known to this Court. See *King* v. *Smith*, 392 U.S. 309 (1968). In brief, those states wishing to take advantage of the substantial federal funds available under the various programs established by the Social Security Act must submit a "state plan" for each such program to the Secretary of Health, Education and Welfare for his approval. 42 U.S.C. §§1381, 1382, 1383, 1384.[10]

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[9] These two cases involve claims for back pay under Title VII of the Civil Rights Act of 1964.

[10] The citations are to Title XVI of the Act, the AABD program. Parallel provisions appear in each of the assistance titles.

The Secretary is under a statutory obligation to approve any such plan which at the time of its submission satisfies the requirements set forth in the applicable title of the Act. All fifty states and the District of Columbia, Guam, Puerto Rico and the Virgin Islands have submitted and had approved state plans under each of the Act's titles except for Nevada which has not submitted an APTD plan. Changes in state plans, which are frequently made, are submitted to HEW as plan amendments for a determination as to whether such plans, as amended, satisfy the requirements of the Act.

Upon the initial approval of each state plan, the Secretary of HEW must make quarterly certification to the Secretary of the Treasury for the payment of federal matching funds, on a formula basis, to each participating state, 42 U.S.C. §§1381, 1383,[11] and must continue such certification until he finds, after a hearing, that such state plan is no longer approvable, 42 U.S.C. §1384.[12] Judicial review of an HEW determination of nonapprovability is available in the United States Courts of Appeals. 42 U.S.C. §1316.

In *Rosado* v. *Wyman*, 397 U.S. 397 (1970), this Court "considered and rejected" the argument that the congressional grant of authority to HEW to cut off federal funds for noncompliance precludes injured public assistance applicants or recipients from suing state officials in federal court to redress violations of invalid state laws or regulations. 397 U.S. at 420. In so holding, the *Rosado* court noted that it was "most reluctant to assume Congress has closed the avenue of effective judicial review to those

[11] See footnote 10, *supra*.

[12] See footnote 10, *supra*.

individuals most directly affected by the administration of its program," *ibid.*, and concluded that there was "not the slightest indication that Congress meant to deprive federal courts of their traditional jurisdiction to hear and decide federal questions in this field."[13] Thus:

> "It is, of course, no part of the business of this Court to evaluate, apart from federal constitutional or statutory challenge, the merits or wisdom of any welfare programs, whether state or federal, in the large or in the particular. It is, on the other hand, peculiarly part of the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use." *Id.*, at 422-423.

The *Rosado* court thus found nothing in the Social Security Act which would preclude the exercise of its "traditional jurisdiction." Under *Porter* and *Mitchell* therefore, all the inherent equitable powers of the federal courts were available. The remedy fashioned by the Court—an injunction against the payment of federal monies should the state not develop a conforming plan within a reasonable period of time—was one selected as particularly appropriate to the circumstances of that case. 397 U.S. at 421-422.

The only distinction between this case and *Rosado* is in the nature of the equitable relief sought. Here, as in *Rosado* (and many other welfare cases which have been

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[13] The Court also noted that it was, in this holding, adhering to its decision in *King* v. *Smith*, *supra*, "which implicitly rejected the argument that the statutory provisions for HEW review of plans should be read to curtail judicial review. . . ." *Ibid.*

before this Court), welfare beneficiaries are seeking declaratory and injunctive relief against the enforcement of an invalid state provision. In both circumstances federal funds are being received and used in a manner contrary to that intended by Congress. In both cases noncompliance with the federal statute or regulation relied upon results in channeling the matching federal grants in a way not intended by Congress. The only difference is that in this case the equitable remedy of restitution is also requested.[14]

Nearly one hundred lower federal courts have considered the issue of whether to order restitution of public assistance benefits unlawfully withheld. See, e.g., the cases discussed in *Alexander* v. *Weaver* (*Townsend* v. *Swank, supra,* on remand), 345 F. Supp. 666, 676-677 (N.D. Ill. 1972). Although only a few of the courts have discussed in any detail the nature of the jurisdiction they were exercising, see, e.g., *Alexander* v. *Weaver, supra,* and although a few have declined to exercise that jurisdiction, see, e.g., *Robinson* v. *Hackney,* 307 F. Supp. 1249 (S.D. Texas 1969), *appeal dismissed,* 397 U.S. 1082 (1970), not one of the courts has considered itself without the equitable *power* to order such relief.[15] The authority of the district court in a case such as this to award restitution has obviously

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[14] As presented to the Supreme Court, *Rosado* did not contain a prayer for retroactive payments. That relief was sought on remand, but held to be barred by the Supreme Court's mandate. 322 F. Supp. 1173 (E.D.N.Y. 1970). See further discussion at pp. 18-20, *infra.*

[15] This of course does not include those courts which have held their jurisdiction barred by the Eleventh Amendment, an issue beyond the scope of this brief. See, e.g., *Westberry* v. *Fisher,* 309 F. Supp. 12 (D. Me. 1970).

been viewed—by these courts—and quite correctly so as beyond question.[18]

Nothing in *Rosado* v. *Wyman, supra,* and on *remand,* 322 F. Supp. 1173, 1195-1196 (E.D.N.Y. 1970), is to the contrary, despite the conclusion drawn by one Circuit Court of Appeals. *Rothstein* v. *Wyman,* 467 F.2d 226, 232-233 (2d Cir. 1972). Thus, although the district court on remand in *Rosado* concluded that it was without power to grant equitable restitution, the basis for the court's conclusion was that such relief was barred by the precise mandate of this Court. 322 F. Supp. at 1196. Judge Weinstein thus reasoned that as this Court, in declaring New York's AFDC plan invalid under §402(a)(23) of the Social Security Act, had directed the district court to either approve the state's program (upon the state's submittal of a new AFDC plan) or restrain the further use of federal monies, 397 U.S. 397, 421-422, the court's power was limited to granting that relief.

There is, however, nothing in this Court's decision in *Rosado* to suggest that the lower federal courts are without equitable power to order restitution. First, the issue of

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[18] This Court has of course also affirmed several judgments awarding such relief. See, e.g., *Gaither* v. *Sterrett,* 346 F. Supp. 1055 (N.D. Ind. 1972), *aff'd,* —— U.S. —— (1973); *Carpenter* v. *Sterrett,* —— F. Supp. —— (N.D. Ind. 1972), *aff'd sub nom. Sterrett* v. *Mothers' and Children's Rights Organization,* 409 U.S. 809 (1972); *Zarate* v. *State Department of Health and Rehabilitative Services,* 347 F. Supp. 1004 (D. Fla. 1971), *aff'd* 407 U.S. 918 (1972); *Doe* v. *Swank,* 332 F. Supp. 61 (N.D. Ill. 1970), *aff'd* 404 U.S. 987 (1971); *Grubb* v. *Sterrett,* 315 F. Supp. 990 (N.D. Ind. 1970), *aff'd* 400 U.S. 922 (1971); *Rodriguez* v. *Swank, supra; Gaddis* v. *Wyman,* 304 F. Supp. 717 (S.D.N.Y. 1968) (order at ¶10,506, Transfer Binder, CCH Pov. Law Rptr.), *aff'd sub nom. Wyman* v. *Bowens,* 397 U.S. 49 (1969); and *Shapiro* v. *Thompson,* 270 F. Supp. 331 (D. Conn. 1967), *aff'd* 394 U.S. 618 (1969). These cases are discussed more fully in the Brief for Respondents.

restitution was neither briefed nor argued before any court in *Rosado* prior to the remand, nor could it properly have been, as the plaintiffs in that case had successfully enjoined the implementation of the New York budget cuts *before* their effective date, only to have that success reversed by the Court of Appeals. 414 F.2d 170 (2nd Cir. 1969). Thus this Court's opinion in *Rosado* did not consider the issue. Second, despite Judge Weinstein's reading of the *Rosado* mandate as being inconsistent with an award of benefits wrongfully withheld, there is nothing in the Court's decision that demonstrates any such inconsistency.

The purported "inconsistency" lay in the fact that had this Court viewed plaintiffs' right to benefits in accordance with §402(a)(23) to have "vested" it could not have ordered the relief it did in the case, namely, an injunction against further use of federal funds if New York failed to submit to the Court a lawful revised AFDC plan within a reasonable time. 322 F. Supp. at 1196. To the contrary, that particular equitable remedy was necessitated solely by the peculiar history of the *Rosado* case, which made any other prospective remedy impractical. The Court's construction of §402(a)(23) afforded New York various methods for complying therewith,[17] and so no other precise injunctive relief was available which could mandate a lawful program. But the difficulties in fashioning prospective injunctive relief had no bearing on the Court's power to fashion *other* equitable relief, i.e., restitution. Indeed, precisely because New York was to be given additional time to establish a lawful program while continuing to use

[17] E.g., New York could have restored special grants *in toto*, or it could have "averaged" them on a statistical basis, or it could have maintained some items and averaged the rest. As this Court noted, the illegal action was not "discreetly severable."

federal funds, restitution could well have been appropriate to redress the harms until such time as it did so.[18]

II.

Where, as in this case, equitable restitution of public assistance benefits wrongfully withheld restores the situation to that which would have been but for the statutory violation in question, and furthers the congressional purposes of the Social Security Act, there is little room for the exercise of discretion not to order such relief.

The exercise of equitable jurisdiction by a federal court is by its very nature within that court's sound discretion. As this Court has made clear, however, where the equitable remedy of restitution will restore the injured parties to the situation they would have been in but for the statutory violation in question, and otherwise further the congressional purposes, "there is doubtless little room for the exercise of discretion not to order reimbursement" *Mitchell* v. *DeMario Jewelry, Inc., supra,* at 296.

In this case, and in virtually every instance in which welfare benefits are unlawfully withheld, an award of retroactive payments clearly restores the injured recipients

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[18] Congress has not only failed to restrict the federal courts' traditional equity power to grant restitution where violations of the Social Security Act have been adjudicated, it would appear that it has specifically authorized such relief. In 42 U.S.C. §1983 Congress provided that any person deprived "of any rights, privileges, or immunities secured by the Constitution and laws" may bring "an action at law, *suit in equity,* or other proper proceeding for redress" of such deprivation. Plaintiffs have been deprived of a valuable "right" granted by a federal "law" (§1382(a)(8) of the Social Security Act) and seek the equitable relief Congress intended the court to award.

to the position they would have been in had the state not violated the law. In Mr. Jordan's case, had his eligibility been determined promptly, he would have at the latest been authorized to receive AABD benefits on November 1, rather than on January 1, the day he actually began to receive assistance. In granting Mr. Jordan the benefits he would have received between these dates, the district court was therefore simply "ordering the return of that which rightfully belong[ed] to [him]." *Porter* v. *Warner Holding Co., supra,* at 402.[19]

The restitution of welfare benefits to the injured recipient also prevents the unjust enrichment of the defendant welfare department. In this instance, for every day in which the Illinois welfare department delayed in acting on Mr. Jordan's application, it was able to save that much in welfare benefits payable to him. As the Seventh Circuit noted, without the remedy of restoration of benefits

> "a state could engage in practices which would deny eligible recipients the full measure of that assistance which Congress has intended for them 'at the minimal risk of a subsequent finding of unconstitutionality [or illegality] (if indeed it is challenged) which finding would come only some time later after the case had gone the judicial route and which would deny retroactive relief thus giving the state the desired effect and savings at least during the period of [their] existence,'" citing *Alexander* v. *Weaver, supra. Jordan* v. *Weaver,* at 995.

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[19] The amount of Mr. Jordan's retroactive entitlement is $195.66. He seeks only the restoration of that amount.

See also *Board of Social Welfare* v. *Los Angeles Co.*, 28 Cal. 2d 90, 162 P. 2d 630 (1945), quoted at fn. 33, *infra.*

Restitution of public assistance benefits unlawfully withheld also furthers the intent of Congress. That intent is for states participating in the welfare programs under the Social Security Act to obey the paramount federal law, for federal funds to be properly spent, and, most importantly, for those eligible for assistance to actually be afforded their statutory entitlement.

The federal-state public assistance programs, of which the AABD program is one, reflect a scheme of "cooperative federalism." *King* v. *Smith, supra,* at 316. States which participate in the programs, however, must conform their state plans to the requirements of federal law. *Id.,* at 317. See also *Rosado* v. *Wyman, supra; Townsend* v. *Swank,* 404 U.S. 282 (1971); *Carleson* v. *Remillard,* 406 U.S. 598 (1972). Therefore in order to deter nonconformity, states which breach their obligations under the Social Security Act should be required to effectuate *nunc pro tunc* compliance by an award of retroactive benefits to those injured by their actions.

No other remedy can effectively deter states from violating the law. A cut-off of federal funds,[20] declaratory relief, or a prospective injunction of the violation operates only in the future. State officials may therefore until such time as any of these remedies is ordered violate the law, with everything to gain and nothing to lose by their actions.

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[20] As this Court is well aware, HEW has been "extremely reluctant to apply the drastic sanction of cutting off federal funds to states that are not complying with federal law." *Rosado* v. *Wyman, supra,* at 426 (Douglas, J., concurring).

Absent an award of retroactive benefits, they will suffer not at all for the period during which they avoid noncompliance, and therefore will be encouraged in—or at least not discouraged from—doing so. Such an award is therefore the only remedy which will ward off "the spectre of a state, perhaps calculatingly, defying federal law and thereby depriving welfare recipients of the financial assistance Congress thought it was giving them." *Jordan* v. *Weaver*, *supra*, at 995.[21]

The wilfulness of a particular state welfare official in wrongfully withholding benefits is not relevant.[22] Thus,

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[21] In a related case, involving the question of whether the Department of Agriculture or the states should be required to make restitution of food stamp benefits unlawfully withheld, *Butz* v. *Carter*, 479 F.2d 1084 (3rd Cir. 1973), the Solicitor General (arguing in favor of the liability of the states) has concluded similarly:

> "The [Food Stamp] Act expressly provides that participating States 'shall assume responsibility . . . for the issuance of coupons.' 7 U.S.C. 2019(b). That responsibility was voluntarily assumed. It was not exercised. In these circumstances, judicial relief against the State for the retroactive portion of unissued stamps may be implied, to enforce the State issuance responsibility expressly set forth in the Act and implementing instructions. No other practicable remedy to cure State laxity in the issuance process is available." * [The footnote (*) states: "A total cut-off of food stamps under 7 U.S.C. 2019(f) is not considered practicable, particularly from the beneficiaries' viewpoint."]. Petition for Certiorari, *Butz* v. *Carter*, No. —— (O.T. 1973), p. 12.

[22] The Second Circuit's decision in *Rothstein* v. *Wyman*, *supra*, found significant to its consideration of whether to order restitution in that case that in their view New York had not engaged in a wilful violation of the Social Security Act. It is unclear from the court's opinion whether it thought that only wilful violations of federal law should be deterred, see 467 F.2d, at 235, paragraph one, or simply that restitution should only be ordered for violations which were wilful. In either case, as developed *infra*, the court was incorrect.

there is a congressional interest in deterring *all* violations of federal law. Moreover, restitution has traditionally been ordered by courts without regard to whether the defendants' unlawful acts are the result of wilfulness or bad faith. The clearest examples are cases under the Fair Labor Standards Act in which employers have argued that their good faith belief that the employees in question were not covered by the Act should prevent an order for restitution of lost wages. As the Tenth Circuit stated in *Schultz* v. *Mistletoe Express Service, Inc., supra,* the equities are on the other side:

> "In essence Mistletoe says that it operated in the honest belief that its terminal operations were not within FLSA and that it is inequitable to penalize it now. We believe the equities run the other way. The belief may have been honest but, as we have pointed out, it was mistaken. Some of the Mistletoe employees are entitled to wages which they have not received. The equities lie with them. Mistletoe should not be enriched by the retention of money which it should have paid in wages." 434 F.2d 1267, 1272.

See also *Burk Builders, Inc.* v. *Wirtz,* 355 F.2d 451, 453 (5th Cir. 1970); *Shultz* v. *Parke, supra,* at 1370; *Wirtz* v. *Malthor, Inc.,* 391 F.2d 1, 3 (9th Cir. 1968).

In addition, wilfulness is of course always difficult to prove. This is particularly so in the welfare area where violations of federal law may be attributable, if not to wilfulness, then only to an incredible lack of concern for enforcement of the law. This must also be deterred.

Thus, for example, welfare recipients virtually always have great difficulty implementing the decisions of this Court, even where these decisions, though not technically

binding on those not parties to the litigation, are clearly applicable to a particular fact situation. New York, for example, as late as January of 1972, nearly three years after this Court's decision in *Shapiro* v. *Thompson, supra,* was forcing recipients to litigate the validity of a durational residency requirement. Although the three-judge court which then restrained New York's 1971-version of such a requirement did so from the bench after four minutes of deliberation in a one-sentence oral opinion, because the issue was so clear, see *The New York Times,* August 10, 1971, p. 1, recipients nonetheless were forced to go to court, indeed all the way to this Court, to obtain relief. *Lopez* v. *Wyman,* —— F. Supp. ——, No. 1971-308 (Aug. 9, 1971), *aff'd* 404 U.S. 1055 (1972). Moreover, between the statute's effective date, and the date of the court's earlier temporary restraining order of July 12, 1971, New York denied aid to persons who had not resided in the state for at least a year and accordingly reaped a financial, if not a legal, benefit from its actions. The "wilfulness" of such action, given the respective roles of the Governor, the legislature and the state welfare commissioner in carrying it out, would be difficult to prove. Cf. *Palmer* v. *Thompson,* 403 U.S. 217, 225 (1971). Their callous disregard for federal law, however, is clear, and should be deterred, as only an order for restitution can do.[23]

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[23] The plaintiffs in *Lopez,* for some reason, did not press any claim for restitution. Since that decision, however, New York has apparently still not conceded the issue. Thus, on April 25 of this year the New York Senate passed and sent to the Assembly a bill which would have barred public assistance to individuals who had not lived in the state for at least one year. *New York Times,* April 26, 1973, p. 49. Opponents of the bill charged its proponents with a move the latter knew to be unconstitutional, and the bill died in an Assembly committee. For related New York residency litigation after *Shapiro* (and prior to *Lopez*), see *Gaddis* v. *Wyman, supra.*

New York is of course not the only state in which litigation has been necessary to obtain compliance with *Shapiro* v. *Thompson*. See, e.g., *Rivera* v. *Dunn*, 329 F. Supp. 554 (D. Conn. 1971); *Barnett* v. *Lindsey*, 319 F. Supp. 610 (D. Utah 1970); *Baxter* v. *Birkins*, 311 F. Supp. 222 (D. Colo. 1970); *Morrison* v. *Vincent*, 300 F. Supp. 541 (S.D. W. Va. 1969). Moreover, one state's refusal to comply may be a catalyst to other states' noncompliance. Thus, the Connecticut statute struck down in *Rivera* v. *Dunn, supra*, that court noted, "followed the lead and essentially adopted the language of the New York legislature in attempting to justify the one year residency requirement." 329 F. Supp., at 558. Such unlawful action by states, even if not "wilful," must be deterred.[24]

In the case at bar, the district court found that Illinois knew it was violating the federal regulations in question. Illinois acknowledges this, but asserts that it had a right to litigate the validity of those regulations. Brief for Petitioner, p. 25, n. 9.[25] Of course, Illinois did have this right,

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[24] Unlawful non-compliance with this Court's statutory decisions is similarly common. Thus, numerous court decisions have also been necessary to obtain individual state compliance with the decision in *Lewis* v. *Martin*, 397 U.S. 552 (1970). See, e.g., *Ojeda* v. *Hackney*, 319 F. Supp. 149 (N.D. Tex. 1970), *aff'd*, 452 F.2d 947 (5th Cir. 1972); *Borkman* v. *Commissioner of Social Welfare*, 128 Vt. 561, 268 A.2d 790 (1970); *Boucher* v. *Minter*, 349 F. Supp. 1240 (D. Mass. 1972); *Grubb* v. *Sterrett, supra; Gaither* v. *Sterrett, supra*. Indeed, Indiana in the *Grubb* and *Gaither* cases appealed the issue to this Court twice, and lost twice.

[25] Illinois has, at best, raised the issue of the validity of the federal regulations very obliquely in this case. That validity was not one of the "questions presented" in the petition for certiorari, although it was briefed by lifting the arguments virtually word for word from the jurisdictional statement in *Rodriguez, supra*. Petition for Certiorari, pp. 23-28. The arguments in the petition for certiorari on this point are then "incorporated by reference" in petitioner's main brief. Brief for Petitioner, at 39.

although *amicus* would suggest that the equitable way to have raised its objections to the federal regulations was not to falsely promise to obey them as it did by accepting federal funds which were conditioned on such a promise, only to assert their invalidity three years later in a suit brought to enforce that promise, but to have directly challenged their validity in a promptly initiated suit against the federal agency. Moreover, once the federal regulations were upheld by this Court in *Rodriguez* v. *Swank, supra,* and the state regulations thereby struck, the asserted good faith of the defense in this case became questionable.[26]

In any event, as discussed above, whether technically "wilful" or not, Illinois should not be permitted to reap the financial benefits of its actions. Rather, "the equities run the other way." *Schultz* v. *Mistletoe Express Service, Inc., supra.* In short, "future compliance may be more definitely assured if one is compelled to restore one's illegal gains." *Porter* v. *Warner Holding Co., supra,* at 400.

A closely related congressional interest to that of fostering compliance with federal law is that of assuring that federal funds are properly spent. As this Court stated in *Rosado* v. *Wyman, supra,* it is particularly part of the duty of the federal courts "no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use." 397 U.S. at 423. For example, in this case,

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[26] Surely the fortuity of the *Rodriguez* class being defined narrowly to include only AFDC applicants does not bear upon the merits of the state's defense in this case in light of the fact that the state and federal regulations apply on equal terms to *all* federally-aided programs.

Illinois, by denying to welfare applicants their federal right to have their AABD applications acted on promptly, has clearly received federal money in violation of the congressional conditions attached to the receipt of that money. This is a misspending of federal funds which should not go unredressed, either prospectively or retrospectively. Equitable restitution of the welfare benefits unlawfully denied will therefore assure that federal monies allocated to the state are "expended in consonance with the conditions that Congress has attached to their use." *Ibid.*

The Illinois welfare director does not deny that restitution furthers the congressional purpose of assuring the proper use of federal funds, but rather argues that Congress has given no indication that is *necessary* to accomplish that purpose, since the only remedy "expressly contemplated" by the Social Security Act is a prospective cut-off of funds. Brief for Appellant, p. 25, citing *Rothstein* v. *Wyman, supra,* at 235.[27] However, as *amicus* has already demonstrated, *supra,* pp. 9-14, the exercise of equitable jurisdiction is not dependent upon the express language of an Act of Congress, or the necessary implication therefrom. *Mitchell* v. *DeMario Jewelry, Inc., supra,* at 290. Rather if the exercise of that jurisdiction would further the congressional purpose, as both Illinois and the *Rothstein* court apparently do not dispute, its exercise is proper and may, indeed, if the congressional purpose would otherwise *not* be served, leave "little room for the exercise of discretion not to order reimbursement." *Id.,* at 296.

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[27] Both Illinois and *Rothstein* also consider this to be an interest "not personal to recipients." This Court in *Rosado,* however, in the context of deciding that recipients could sue states directly to redress violations of federal law (see pp. 15-17, *supra*), found this to be an important interest served by such a suit. 397 U.S. at 423.

The argument that although federal funds have concededly been misspent, an award of retroactive benefits is not justified because of the "significant increase in federal-state tensions which [results] from a court order requiring the state to expend its funds against its will," *Rothstein, supra,* at 235, is similarly flawed. First, a prospective injunction of course also increases "federal-state tensions" and requires the state to "expend funds against its will,"[28] yet the validity of that relief is unquestioned. Moreover, the money which the state is being required to expend on an award of retroactive benefits is money which the state was obligated to spend in the first instance, and would have spent but for the violation of federal law. As the Seventh Circuit stated in this case:

> "Since the State of Illinois obligated itself to follow federal law in disbursing welfare assistance, it cannot cogently complain that having to make those payments now, which federal law required it to make in the first place, will wreak fiscal disruption. In accepting the federal assistance program, the state must have calculated the cost of compliance." *Jordan* v. *Weaver, supra,* at 993.[29]

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[28] Indeed, in this case the cost of prospective compliance is greater than the cost of the retroactive relief sought. *Jordan* v. *Weaver, supra,* at 991.

[29] See also *Hodgson* v. *Taylor, supra,* at 290: "[t]he financial hardship caused by the order [an injunction prohibiting the employer from withholding unpaid back wages under the FLSA] is not a valid basis on which to deny the employees their remedy or to allow a wrong against the public to go uncorrected." Accord, *Shutz* v. *Mack Farland & Sons Roofing Co.,* 413 F.2d 1296, 1302 (5th Cir. 1969); *Wirtz* v. *Malthor, Inc., supra.* A court of equity might, however, ease the fiscal effect of an order of restitution by permitting the state welfare officer to pay the benefits in equal installments over a period of months rather than at one time in a lump sum.

A question separate and apart from that of fiscal cost, i.e., the cost attributable to the amount of the retroactive entitlement, is that of *administrative* cost, i.e., the cost of *making* the retroactive benefits. This latter cost is properly an equitable consideration. Some administrative cost is involved in virtually every award of retroactive welfare benefits. In most instances, however, it is substantially less than the amount of the benefits themselves and not much, if any, more than the amount of administrative cost which would have occurred had the benefits been paid at the time of the original entitlement to them. Moreover, even where the administrative cost is substantial, it should always be weighed against the relative importance of the benefits to the plaintiffs, see discussion pp. 36-45, *infra,* and thus will rarely be so great as to tip the equitable balance against an award of restitution.

A similar equitable consideration is that of the administrative burden or difficulty which may be involved in implementing an award of retroactive benefits. As with administrative cost, this is rarely a consideration which will outweigh the strong equities which otherwise militate in favor of an order of restitution. Moreover, a court of equity has various means of easing the administrative burden on the welfare department which are consistent with fully protecting the rights of individual recipients. Thus, for example, where plaintiffs have requested class relief,[30] a decree might be framed which would require notice by the welfare department to all members of the class of their entitlement to restitution, but require pay-

[30] The question of whether, in the first instance, to award class relief or relief for only the named plaintiffs would of course be governed by Rule 23.

ment only to those members who within a specified time period come forward to have the actual amount of their entitlement calculated. See, e.g., the orders in *Grubb* v. *Sterrett, supra; Gaddis* v. *Wyman, supra; Doe* v. *Swank, supra.*[21] Alternatively, the decree might require the amount of each individual's entitlement to restitution to be determined at a fair hearing. See, e.g., the order in *Solman* v. *Shapiro,* 300 F. Supp. 409 (D. Conn. 1969), *appeal dismissed,* 399 U.S. 488 (1970). Or the court might, because of a particular administrative difficulty in locating persons who were denied assistance many years prior to the institution of the lawsuit, choose a "cut-off" date, that is the date back to which restitution is to be made, which equitably addresses that problem.[22] See, e.g., the orders in *Machado* v. *Hackney,* 266 F. Supp. 644 (W. D. Tex. 1969) (date complaint filed); *Stoddard* v. *Fisher,* 330 F. Supp. 566 (D. Me. 1971) (date benefits denied). In short, each case must of course be decided on its own equities, but the district courts are not without power to fashion a remedy appropriate to any particular situation.

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[21] Of course in a situation where the class is composed of all welfare recipients in a certain category, such as a suit challenging payment differentials between various counties in a state (cf. *Rothstein* v. *Wyman, supra*), the class is so easily identifiable that a state might properly be required to simply institute an across-the-board increase within a certain time period, rather than notifying personally each member of the class and putting the burden on that individual to come forward. Alternatively, each individual's entitlement for retroactive benefits might be computed at the required redetermination of that individual's eligibility for assistance, and a check for that amount be disbursed at that time.

[22] For each individual the cut-off date is always the date on which the incorrect action in her or his case was taken, which, at the earliest, would be the effective date of the challenged statute or regulation.

The third and most important congressional policy furthered by an award of retroactive benefits is the "fundamental goal" of the Social Security Act—"the satisfaction of the ascertained needs of impoverished persons." *Rothstein* v. *Wyman, supra,* at 235. As this court has many times made clear, public assistance benefits are statutory entitlements, afforded as of right to those individuals eligible to receive them. *King* v. *Smith, supra; Goldberg* v. *Kelly,* 397 U.S. 254 (1970); *Townsend* v. *Swank, supra; Carleson* v. *Remillard, supra.* Thus in this case, when the state of Illinois determined that John Jordan was eligible to receive AABD benefits, it was not "volunteering" any funds or services as an act of mercy or aid to help Mr. Jordan, but rather was performing its statutory duty to aid all needy, disabled persons. Once Mr. Jordan's eligibility was determined, therefore, the state's commitment to provide him public assistance benefits "vest[ed] in and accru[ed] to" him, and if "not met due to an [illegal] withholding of benefits it must be made up to cover that period during which it was wrongfully denied." *Alexander* v. *Weaver, supra,* at 675.[33]

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[33] See also *Board of Social Welfare* v. *Los Angeles Co., supra*:

"It was the mandatory duty of the county to furnish aid according to the plan therefore which is laid down by the applicable provisions of the Welfare and Institutions Code [citations omitted]. *The obligation to pay became a debt due from the county to the applicant as of the date the latter was first entitled to receive the aid* [citations omitted]. The bare fact that an applicant has by one means or another managed to ward off starvation pending receipt of the payments to which he was previously entitled provides no sufficient excuse for a county to refuse to make such payments. To hold otherwise would, as suggested by the petitioner herein, provide a money saving device for the counties at the expense of most of our citizenship least able to bear the burden thereof." (Emphasis added.)

The substance of the statutory entitlement to public assistance is well revealed in the evolution of public aid programs from the pre-Depression pattern of relief. Thus prior to 1935, relief was administered as an act of charity, private and public, through thousands of poor relief agencies. Benefits were a discretionary "dole" dispensed in whatever amount and on whatever conditions a social worker saw fit to formulate. There was no attempt to define who was "eligible" or to give aid to more than a fraction of those similarly in need.[34] Aid was confined to the "worthy" poor and recipients were subjected to civil disabilities and severe behavioral restraints to keep them worthy.[35] Withdrawal of aid was as whimsical as its dispensation. Not surprisingly, a rule of law had no function in this system of relief; courts abstained on the ground that welfare was a gratuity or a privilege to be administered with complete discretion. See, e.g., *City of Albany* v. *McNamara*, 117 N.Y. 168, 174, 22 N.E. 931 (1889); *Wilkie* v. *O'Connor*, 261 App. Div. 373 (N.Y. 1941).

The Social Security Act of 1935, though reflecting a limited view of federal powers, cf., *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Schechter Poultry Co.* v. *United States*, 295 U.S. 495 (1935), sharply departed from this pattern by establishing a "right" to public assistance benefits and requiring fair methods of administration respecting this right. Hence, the Act requires that the state agency provide an opportunity for a "fair hearing" to all aggrieved applicants and recipients, 42 U.S.C. §1382(a)(4); provide safeguards on the use or disclosure of information con-

[34] See Bell, *Aid to Dependent Children*, 11-19 (1965). See also Abbott, E., *Public Assistance*, 35 (1966).

[35] Abbott, G., *From Relief to Social Security*, 227 (1966).

cerning recipients, 42 U.S.C. §1382(a)(7); provide aid in the form of cash payments without restrictions on use, 42 U.S.C. §§1383, 1386; and provide a uniform program throughout the state under the administration or supervision of a single state agency. 42 U.S.C. §1382(a)(1) and (3).[36]

The concept of entitlement gave rise over the years to an expanding network of federal and state legislative controls on the conditions of eligibility for aid. As this Court recounted in *King* v. *Smith, supra,* this evolution confirmed the rejection of the pre-Depression standard of "worthiness" as the touchstone of aid. "Federal public welfare policy now rests on a basis considerably more sophisticated and enlightened than the 'worthy person' concept of earlier times." 392 U.S. at 324-25. All persons sufficiently disadvantaged to fall within the categories singled out for aid and who lack the resources and income deemed necessary for survival are, as a matter of statutory right, entitled to assistance. *Goldberg* v. *Kelly, supra,* at 262. In the words of the statutory command, "aid . . . ***shall*** be furnished with reasonable promptness to all eligible individuals." (Emphasis supplied.) 42 U.S.C. §§302(a)(8); 402(a)(10); 1202(a)(11); 1352(a)(10); 1382(a)(8). *King* v. *Smith, supra; Townsend* v. *Swank, supra; Charleson* v. *Remillard, supra.*

The federal regulations implementing the "reasonable promptness" provisions above recognize this statutory entitlement throughout. They speak of the individual's right to know about the public assistance programs, to apply for

[36] The citations are to Title XVI, the AABD program. Parallel provisions appear in each of the assistance titles.

them, to be informed about "rights and obligations" under the programs, and, if found to be eligible, to continue to receive payments until found to be ineligible. 45 C.F.R. §206.10. The particular regulation which is at issue in this case provides that a decision is to be made promptly, pursuant to state-established time standards not in excess of 30 or 60 days, depending on the category of assistance. Federal Handbook of Public Assistance Administration, Pt. IV, 2200(b)(3); 45 C.F.R. §206.10(a)(6)(i). Both the statute and regulations contemplate that where the state exceeds these time standards, restoration of benefits back to the thirtieth or sixtieth day is proper.[37]

Indeed, HEW regulations clearly require that where the wrongful action of a state welfare department is resolved in a fair hearing, or by the agency prior to the hearing, corrective payments *must* be made retroactively to the date of incorrect action. 45 C.F.R. §205.10(a)(13).[38] Thus in this case, if Mr. Jordan had been vindicated in a fair hearing rather than in a court proceeding, he would have received retroactive benefits pursuant to HEW's regulations.[39] The result should be no different simply because he elected to pursue his remedies in a federal court rather

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[37] New federal regulations, effective October 15, 1973, *require* payment no later than the 30th (60th in disability) day, although the time for determining eligibility in OAA, AB and as to the aged and blind in AABD has been extended to 45 days. See 45 C.F.R. §206.10(a)(6)(i), 38 Fed. Reg. 22009 (Aug. 15, 1973).

[38] New federal hearing regulations, effective October 15, 1973, renumber this section as 45 C.F.R. §205.10(a)(18).

[39] Federal matching is available both for such payments and for retroactive payments pursuant to a court order. Thus 45 C.F.R. §205.10(b)(2) provides:

"Federal financial participation is available for . . . (2) payments of assistance made to carry out hearing decisions, or to take corrective action after an appeal but prior to hearing, or to extend the benefit of a hearing decision or court order to

than in an administrative hearing.[40] This is particularly so in this case, since if Mr. Jordan and the other AABD applicants in Illinois had been included in the original class of AFDC recipients who sued the state in *Rodriguez* v. *Swank, supra,* to compel compliance with the same federal requirement at issue in this case, they would have received the restitution requested herein by virtue of this Court's summary affirmation of the district court's order requiring such relief in that case. Their entitlement to benefits—and equitable "right" to them—could therefore not be clearer.

The statutory entitlement is, of course, to have one's current and immediate needs met. It does not thereby follow, however, that "as time goes by . . . retroactive payments become compensatory rather than remedial." *Rothstein* v. *Wyman, supra,* at 235. Such a conclusion assumes that, once deprived of the subsistence benefit, a person no longer suffers the consequences of this deprivation. Such is simply not the case. Rather, the consequences of a deprivation of assistance are *continually* felt, and can begin to be undone only by an award of retroactive payments.

Thus, the categorical assistance programs are residual programs whose entitlements are the last resource for

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others in the same situation as those directly affected by the decision or order. Such payments may be retroactive in accordance with applicable Federal policies on corrective payments." [The numbering and language is the same in the version of the regulations effective October 15, 1973.]

See also *Memorandum for the United States as Amicus Curiae, Rodriguez* v. *Swank, supra,* No. 1269 (O.T. 1970), pp. 9-10, quoted in *Rothstein* v. *Wyman, supra,* at 240.

[40] This is of course particularly so in a federal action pursuant to 42 U.S.C. §1983, as under this statute one is not required to exhaust administrative remedies. *Damico* v. *California,* 389 U.S. 416 (1967); *Carter* v. *Stanton,* 405 U.S. 669 (1972).

individuals and families who have been found to be unable to support themselves or to qualify for other forms of public aid, and who have no other private source of support. To qualify and remain qualified for assistance in all states, individuals must have virtually no income and must report, and relinquish to the welfare agency or expend, virtually all resources, assets and property unrelated to their current basic needs.[41] "There is one overwhelming fact which controls here. By hypothesis, a welfare recipient is destitute, without funds or assets." *Kelly* v. *Wyman*, 294 F. Supp. 893, 899 (1968), *aff'd sub nom. Goldberg* v. *Kelly, supra.*

Income and resources limitations are of course not inconsistent with a program designed to meet the immediate needs of destitute individuals. Nor would they work any particular hardship if the public assistance grant adequately provided for those needs. Because the aid afforded is well below that which is minimally necessary for survival, however, and in some instances not even *intended* to meet in full the basic monthly needs of its beneficiaries, individuals and families in receipt of public assistance are engaged in a constant battle for survival in which they are nearly always on the losing side.

The gross inadequacy of the public assistance grant is well documented. The amounts provided by each state in

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[41] Under current federal regulations, the *maximum* cash reserve permitted for each recipient is $2,000, 45 C.F.R. §233.20(a)(3), but most states permit far less. For example, 43 jurisdictions permit no cash reserve to be retained in either AFDC or OAA. Public Assistance Report No. 50, Characteristics of State Public Assistance Plans under the Social Security Act (1971 Edition), Assistance Payments Administration, Social and Rehabilitation Service, United States Department of Health, Education and Welfare.

every category of assistance are substantially lower than the standards which have been determined by the United States Government to be minimally necessary for low-income individuals.

Thus as of July 1971 the largest monthly amount that could be paid for basic needs to a single OAA recipient ranged from a high of $250 a month ($3000 annually) in Alaska to a low of $75 a month ($900 annually) in Mississippi.[42] The median amount paid was $130 a month ($1560 annually). The State of Illinois pays $169. For an aged couple the largest monthly amount paid for basic needs ranged from $350 ($4200 annually) in Alaska to $121 ($1452 annually) in South Carolina. The median amount paid was $200 a month ($2400 annually). Illinois pays $211.[43] The largest monthly amounts paid AB and APTD recipients were similar. National Center for Social Statistics Report D-2, Program Statistics and Data Systems, Social and Rehabilitation Service, United States Department of Health, Education and Welfare, Tables 1 and 2 (July 1972) (hereinafter NCSS Report D-2).

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[42] As this Court is well aware, each federally-funded financial assistance program must establish a "standard of need", which represents the amount which the state has determined is necessary each month for an individual or family to purchase their basic subsistence needs. Cf. *Rosado* v. *Wyman, supra.* States need not pay eligible individuals the full amount of the standard, however, but may impose maximums on the amount of aid paid or pay only a percentage of need. *Dandridge* v. *Williams,* 397 U.S. 471 (1970), *Jefferson* v. *Hackney,* 406 U.S. 535 (1972). The amounts quoted here represent the amounts actually paid to individuals of families with no income, not the standards of need for such individuals.

[43] The largest monthly amount paid a single, aged individual in Puerto Rico for basic needs was $22 ($264 annually); for a couple, $35 ($420 annually). Puerto Rico and the Virgin Islands receive a reduced share of federal matching funds, and therefore have generally the lowest grants in all programs.

In the AFDC program the amounts are even lower. There the largest monthly amount paid to a family of four for basic needs in July 1971 ranged from a high of $375 a month ($4464 annually) in Alaska to a low of $60 a month ($720 annually) in Mississippi.[44] The median amount paid was $227 a month ($2724 annually). Illinois pays $217. NCSS Report D-2, Table 6.

When these amounts are compared with the amounts the United States Government has determined are minimally necessary for survival, the results are startling. Using just the family figures, which are the easiest to compare, the so-called federal "poverty line," developed in 1965 by the Social Security Administration and updated currently by the Bureau of the Census, defined the income level which separates the poor from the nonpoor as $4137 for a nonfarm family of four in 1971. Current Population Reports, U.S. Dept. of Commerce, Bureau of the Census, Series P-60, No. 82 (July 1972), Table 6, p. 7.[45] Only three states[46] had

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[44] Puerto Rico pays $53 a month, or $636 annually.

[45] The "poverty line" was originally arrived at in 1965 by taking the cost of the United States Department of Agriculture's "economy" food plan for a family of a given size, and adding two dollars for every dollar in the "economy" food plan for *all* other living expenses. Through both its choice of food plan and food/non-food ratio, the plan has been criticized even by its originator for its distortion of actual living costs. Orshansky, *Counting the Poor; Another Look at the Poverty Profile*, Social Security Bulletin, Vol. 28, No. 1 at p. 10 (January 1965). Thus it was based on a food plan designed for "temporary or emergency use when funds are low," *Id.*, at p. 6, rather than the slightly more generous U.S.D.A. "low-cost" food plan; and was based on a 1:4 1955-established ratio in spending costs although the Bureau of Labor Statistics had determined in 1961 that the food/non-food spending ratio was in fact 1:4. Since that time, the original SSA poverty definition has been modified by making "annual adjustments in the line to account for changing prices made to reflect changes in the Consumer Price Index rather than fluctuations in the per capita cost of food in-

AFDC grants above this level in July 1971; the highest amount paid a family of four in the remaining states ranged from $29 to $3501 *below* this figure. The median AFDC amount paid a family of four in 1971 was $2413 below $4137.

The Bureau of Labor Statistics has also calculated the minimal amount necessary for an urban family of four to live at a lower income level. In mid-1971 this amount was set at $7214 ($7536 for the Chicago area), $2750 more than the *highest* amount paid for AFDC in that year, and $4490 more than the median amount paid. "BLS Reports Rise in City Worker Family Budget in 1971," U.S. Dept. of Labor, Bureau of Labor Statistics, news release for April 27, 1973.[47] Clearly by either this standard, or the lower "pov-

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cluded in the economy food plan," although the impact of this revision on the data is termed "slight." Current Population Reports, U.S. Dept. of Commerce, Bureau of the Census, Series P-60, No. 67 (December 30, 1969), p. 3. Significant reason therefore remains to believe that poor families are not able to live in health and decency on the basis of income at the poverty line, particularly as the Department of Agriculture has estimated that only about one-fourth of the families who spend the amount allotted for food under the "low-cost" plan annually have a nutritionally adequate diet. Groom, *A New City Worker's Family Budget*, Monthly Labor Review, Vol. 90, No. 11, p. 6 (Nov. 1967).

[46] Alaska (see p. 39, *supra*), Michigan ($350 a month, or $4200 annually), and Massachusetts ($349 a month, or $4188 annually) are the states. NCSS Report D-2, Table 6.

[47] The BLS figures are an attempt to estimate actual costs, at current price levels, of purchasing the specified lists of goods and services drawn up. The lower level budget includes allowances for food (based on the Department of Agriculture's "low-cost" plan), housing, transportation, clothing and personal care, medical care and other items the family consumes directly including life insurance, occupational expenses, Social Security, personal income taxes, and personal items. As the BLS amount contains $609 for medical care, some of the cost of which may for welfare recipients be paid

erty line," the public assistance grants of all the states are wholly inadequate.

The actual structure of the public assistance grant similarly reveals how few of each individual's or family's current needs can actually be met—or, indeed, are even intended to be met—by that grant. Thus public assistance is provided on a monthly or semi-monthly basis with the intent of covering an individual's or family's basic needs—food, shelter and clothing—for the monthly or semi-monthly periods following its receipt. However, in all states certain items of need—for example, an occasional newspaper or magazine, school supplies, or such articles of clothing as a belt or suspenders—are simply not budgeted for at all, as it is assumed that these items are not "needed."[48] Thus, the recipient who reads a newspaper, because she considers herself part of the world despite her welfare status, or who buys a belt because he must keep his pants up somehow, will have to find the money for these

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by the Medical Assistance program, 42 U.S.C. §1396a, *et seq.*, and $1020 for taxes, the payment of which may be excluded as a work expense for some recipients, it may be legitimate to deduct these amounts in determining the needs of a public assistance family. Even after these amounts, totalling $1629, are deducted, however, the revised BLS standard of $5341 is well above the welfare levels in all of the states.

[48] The President's Commission on Income Maintenance, employing the 1968 "poverty line" figure of $3553 for an urban family of four, which is $729 higher than the median amount paid in *1971* for an AFDC family, similarly found that at the outset a poor family must do without many of the things that families with an average income consider to be "necessities"—"a car, an occasional dessert after meals, rugs, a bed for each family member, school supplies, or an occasional movie." *Poverty Amid Plenty, The American Paradox,* Report of the President's Commission on Income Maintenance, p. 15 (1969) (hereinafter *Poverty Amid Plenty*).

items at the expense of some state-designated essential item. Whatever the result, some current need must go unmet.[49]

A few states, in addition to the recurring grant for basic needs, provide for grants to meet certain "special" needs which are particular to the individual or family—for example, allowances for medically-required special diets, extra money for washing diapers, grants for a variety of major items of clothing or furniture, or money to cover fumigation or moving expenses. Unlike the items above, these items are conceded by the state to be "needed," but only by some individuals at certain times. Most states, however, including Illinois in AFDC for all but a few items, have abolished "special" grants in favor of a "flat" grant which reflects an averaging of the former amounts actually paid for special grants into one monthly or semi-monthly payment intended to cover all needs. Cf. *Rosado* v. *Wyman, supra,* 322 F. Supp. 1173 (E.D.N.Y. 1970), 437 F.2d 619 (2nd Cir. 1970), *aff'd* 402 U.S. 991 (1971). In these states, which are by far the majority,[50] welfare recipients are expected to "save" large portions of their basic recurring grants over a period of months or go deep into installment credit debt in order to purchase such items as a bed to sleep in,[51] a couch to sit on, or a coat to keep a child warm. For example, assume an aged individual or family in need

[49] "I have to cut corners and now I am cutting down the middle. I don't have any corners left to cut."—Witness before the Commission, St. Joseph, La. *Poverty Amid Plenty,* p. 17.

[50] HEW recommends that states adopt this budgetary method. See U.S. Department of Health, Education and Welfare, Bureau of Family Services, *Simplified Methods for Determining Needs* (edited by Gladys White, 1964).

[51] Thirty percent of families live in homes where each family member does not have a bed. *Poverty Amid Plenty, supra,* p. 15.

of $400 worth of major furniture and clothing, with a monthly recurring grant of $200. This immediate need must simply go unmet until a sufficient amount can be saved—which, even if the individual or family could manage to put aside as much as $20 a month, would take nearly *two* years! In such situations, the grant is not even *intended* to be able to cover concededly current needs.

Where a state's level of benefits is, on top of this, less than the full standard of need,[52] as it is in AFDC in 39 jurisdictions and in the adult welfare categories in 20 jurisdictions,[53] there is absolutely no way in which the grant can meet the recipient's current need. In these states money spent by the recipient on one-state designated essential item must always be at the expense of another state-designated essential item, as only a percentage of the state-determined amount needed to purchase such items is actually paid. A recipient who additionally wishes to purchase some item *not* included in the standard—the occasional newspaper above, or perhaps some toys for Christmas—or some item included but intended to be purchased only by monthly saving, such as a bed, could well spend virtually all of her or his monthly allowance for basic needs in a single day and unbalance the entire budget beyond repair.

In sum, the severity of the income and resources restrictions, the meagerness of the public assistance grant, and the omissions and understatements in that grant impose upon the welfare recipient a series of impossible choices, none of which can ever be exercised "successfully." The

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[52] See footnote 42, *supra*.

[53] See NCSS Report D-2, Table 6.

result is that welfare recipients, even when they are receiving the full amount of their entitled assistance, are always "behind." They always have no money for some items. They thus always have debts,[54] or are forced to save whatever they can each month (by cutting down on or doing without certain designated items in the standard[55]) so that at the end of several months they can perhaps purchase certain items.[56]

When, for some reason, the eligible recipient is wrongfully deprived of a payment for one or several months, she or he can probably never "catch up." The harms are inescapable, they occur at once, and they continue as intense in the early days as afterwards. For this reason, all that a retroactive payment of benefits does for the particular individual is to put her or him in the position she or he would have been in had the entitlement been correctly paid—that is, a lesser amount "behind." A payment of retroactive benefits is thus hardly a "windfall." Even if the recipient has managed to live through the period when the benefits should have been paid, this has obviously been done only by borrowing or living on credit, in which case there are debts to be paid, or by foregoing items of need, many of which may be just as sorely needed now (such as clothing), or perhaps even more sorely needed precisely

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[54] "We don't pay the full price for food. We get credit on food and pay once a month. But we don't pay all of it, we just pay a portion of it. [The grocer] carries [the rest] over to the next month."—Witness before the President's Commission on Income Maintenance, *Poverty Amid Plenty, supra*, at 16.

[55] "I either eat good and smell bad, or smell good and don't eat." *Ibid.*

[56] When another witness (before the President's Commission) was asked how he made ends meet, he replied, "They don't meet." *Ibid.*

because the individual did not receive a grant, although entitled to it (such as dietary supplements to make up for nutritional deficiency suffered during that period).[57] The consequences of a deprivation of assistance are thus *continually* felt and, contrary to the *Rothstein* court's assertion, 467 F.2d at 234, can begin to be "undone" *only* by an award of retroactive payments.[58]

The conclusion that with the passage of time retroactive payments become compensatory rather than remedial is also flawed insofar as it results from a failure to recognize that there will *always* be a lapse between "the last contested payment and the order of the district court," *Rothstein, supra,* at 235, simply because litigation takes time. Thus

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[57] Numerous similar ways of coping with inadequate incomes were documented in the President's Commission field research. One common method was simply not to pay a recurring expense such as rent or utilities. While this of course may result in eviction or a cut-off of services, it effects a saving for at least that month. "Borrowing" food or other items from friends and relatives was another common method, although rarely are such items able to be repaid. Reliance on credit was a third method. One witness told of disposing of possessions to meet current expenses: "We sold our home and sold everything we had. Had to. I always have to plan it out some way or find something around the place to sell or something." *Poverty Amid Plenty, supra,* at 16. The Commission concluded:

> "The poor inhabit a different world than the affluent primarily because they lack money. . . . They are generally unhappy with their circumstances and would like to be unpoor. Many Americans wonder why the poor do not escape from poverty. The answer to this question is clear to us: They usually cannot, because most are already doing as much as can reasonably be expected of them to change their conditions." *Id.,* at 21.

[58] The fact that HEW regulations require payment of retroactive benefits pursuant to a fair hearing, and that federal matching is available both for these payments and for payments pursuant to a court order, also confirms that such payments are a statutory entitlement for which eligible individuals have unquestioned need, regardless of how much time has passed since the benefits were withheld.

even if the plaintiffs, as here, 467 F.2d 985, 992, n. 11, file their lawsuit timely and pursue it vigorously,[59] the defendants may be dilatory in responding, the individual court which the action is before may take time to make its decision, or crowded court dockets may slow down the process.[60] Surely the plaintiffs should not, as the *Rothstein* court suggests, however, be penalized for delays which are so clearly beyond their control.[61]

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[59] Where the plaintiff delays in bringing the lawsuit, does not press the claim, or is otherwise dilatory, the equitable doctrine of laches may be a proper defense.

[60] "[I]n some areas of the country, most notably in our larger cities, the time between when a claim arises and when it is heard on the merits and decided is far too long. We recognize this [delay] as the foremost problem facing our profession today. . . ." PROCEEDINGS OF THE ATTORNEY GENERAL'S CONFERENCE ON COURT CONGESTION AND DELAY IN LITIGATION 138 (1956). See also Rosenberg, "Court Congestion: Status, Causes, and Proposed Remedies," The Courts, the Public and the Law Explosion 29-59 (1965), and *Jordan* v. *Weaver*, *supra*, at 992.

[61] The *Rothstein* court acknowledged that "there may perhaps be cases in which the *prompt* payment of funds wrongfully withheld" will serve the congressional purpose of satisfying the needs of impoverished persons, *ibid.*, but held that in that case, as over sixteen months had elapsed, the congressional purpose would not be served. The delay, however, was entirely attributable to the court process. Thus within a month of the effective date of the challenged statute a three-judge court had been convened and had stated its purpose to issue a preliminary injunction against the statute. The injunctive order, however, was not signed until over a month later, with an effective date of approximately a month beyond that time. The retroactivity sought was thus for the approximately three months between the effective date of the statute and the district court's preliminary injunction. The case was then appealed to this Court, which vacated and remanded the cause to the district court, whose final judgment was therefore not forthcoming until approximately a year after its original injunction. An order for restitution was submitted promptly, within a month, but the district court did not render its decision until over a year later, some sixteen months after its original preliminary injunction.

The question of the propriety in any particular case of an award of retroactive benefits to persons who are no longer receiving assistance is a separate one. Thus, although a court of equity might wish to consider whether restitution of benefits to persons no longer on the state welfare rolls furthers the congressional interest in meeting the ascertained needs of impoverished persons, this is not properly, in and of itself, cf. *Rothstein* v. *Wyman, supra,* at 234, a basis for denying restitution entirely. For one, an award to persons no longer on the rolls does restore an ill-gotten gain, and furthers the congressional interests in deterring noncompliance with federal law and assuring that federal funds are spent in compliance with that law. Moreover, the statutory entitlement to the benefits, whether one is still receiving them or not, is undisputed. Indeed, HEW regulations providing for retroactive payments following a fair hearing do not distinguish between persons currently on the rolls and persons no longer receiving assistance, 45 C.F.R. §205.10, and HEW will match court-ordered retroactive payments to persons no longer on the rolls. *Ibid.* See *Memorandum of the United States as Amicus Curiae, Alexander* v. *Weaver, supra.* The court which nonetheless finds this consideration overwhelming of course has the equitable alternative of denying relief to persons no longer on the rolls, rather than denying restitution to *all* persons affected by the illegality in question, as the *Rothstein* court incorrectly did.[82]

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[82] The question of whether an award of retroactive benefits might result in a decrease in the amount of money paid to persons currently on the rolls (*Rothstein*, at 234), is, we submit, *not* a relevant one. First, states may of course at any time reduce the amount of assistance paid. *Dandridge* v. *Williams, supra.* Thus, whenever welfare recipients determine to enforce any of their rights under law, if the vindication of those rights would in

In sum, each case must of course be considered on its own equities. This *amicus* brief has attempted to demonstrate, however, that equitable restitution of welfare benefits will always restore the plaintiffs to the situation they would have been in but for the statutory violation in question, and will generally advance the congressional purposes of assuring compliance with the Social Security Act, insuring the proper use of federal funds, and providing the plaintiffs with the statutory entitlement for which they have unquestioned need. Moreover, we have shown that in the particular case before this court such an award, as concluded by the district court and the court of appeals, will accomplish these objectives. There is accordingly "little room for the exercise of discretion not to order reimbursement," *Mitchell* v. *DeMario Jewelry, Inc., supra,* at 296, and the district court therefore quite properly awarded restitution to Mr. Jordan and the class he represents.

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any way cost the state money, the recipients run the risk that their lawsuit will be the "cause" of a corresponding decrease in payments to themselves and to other persons on the rolls, *whether or not* they request *retroactive* relief. Second, if such considerations influenced a federal court's decision to order either declaratory or prospective injunctive relief, that relief would rarely if ever be granted. For the same reason, they should not influence its decision to order retrospective equitable relief.

III.

CONCLUSION

For all the foregoing reasons, the judgment of the court of appeals must be affirmed.

Respectfully submitted,

NANCY DUFF LEVY
HENRY A. FREEDMAN
NLSP Center on Social
Welfare Policy and Law, Inc.
25 West 43rd Street
New York, New York 10036
Attorneys for Amicus[62]

[62] Counsel gratefully acknowledges the research assistance of New York University law students Gregory Kern and James Raggio.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 72-1410

JOEL EDELMAN, etc.,

Petitioner,

—v.—

JOHN JORDAN, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

JACK GREENBERG
CHARLES STEPHEN RALSTON
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

Attorneys for Amicus Curiae

TABLE OF CONTENTS

PAGE

Statement of Interest of the *Amicus Curiae* 1

Summary of Argument 3

Statement of the Case 5

ARGUMENT

I. Neither the Eleventh Amendment nor sovereign immunity may be asserted to prevent effective relief for a violation of the Thirteenth, Fourteenth or Fifteenth Amendments 8

A. The specific and more recent provisions of the Reconstruction Amendments must prevail over sovereign immunity and the earlier general language of the Eleventh Amendment 8

B. Sovereign immunity has no application to activities which the Reconstruction Amendments placed outside the sovereign power of the States 12

C. The purposes of sovereign immunity and the Eleventh Amendment are inconsistent with the purposes of the Reconstruction Amendments 18

1. Reliance on state enforcement 18

2. Problems of federal enforcement 24

3. Remedial purpose of the Reconstruction Amendments 28

PAGE

D. By ratifying the Reconstruction Amendments the States consented to be sued for violations thereof 34

E. An unwarranted expansion of the scope of sovereign immunity and the Eleventh Amendment would greatly weaken the constitutional guarantees contained in the Reconstruction Amendments 39

CONCLUSION 42

Cases:

Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) 16
Bennett v. Gravelle, 323 F.Supp. 203 (D.Md. 1971) 41
Bivens v. Six Unknown Fed. Narcotics Agents, 403, U.S. 338 (1971) 29, 38
Board of Supervisors of Louisiana State U. v. Fleming, 265 F.2d 736 (5th Cir. 1959) 40
Board of Trustees of Arkansas A.&M. College v. Davis, 396 F.2d 730 (8th Cir. 1968) 40

Chicago, etc. R.R. Co. v. United Transportation Union, 402 U.S. 570 (1971) 12
Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) 12, 13, 19, 25, 34, 42
Civil Rights Cases, 109 U.S. 7 (1883) 28, 37, 38
Cohens v. Virginia, 19 U.S. 264 (1821) 4, 15, 35, 36, 37

Dillenberger v. Florida Probation and Parole Commission, Civ. No. 73-66 (N.D. Fla., Tallahassee Div.) 41
Dorsey v. State Athletic Commission, 168 F.Supp. 149 (E.D. La. 1958) 40
Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) 16
Dugan v. Rank, 372 U.S. 609 (1963) 10

PAGE

Employees v. Missouri Public Health Department, 411 U.S. 279 (1973) 2, 5, 11, 14, 28, 37, 40, 41
Entick v. Carrington, 19 Howell St., Tr. 1029 (1765) 38
Ex Parte Ayers, 123 U.S. 443 (1887) 9
Ex Parte Young, 209 U.S. 123 (1908) 3, 6, 7, 8, 9, 10, 11

Fitts v. McGhee, 172 U.S. 516 (1899) 9

General Oil Company v. Crain, 209 U.S. 211 (1908) 9, 30
Goldberg v. Kelly, 397, U.S. 254 (1970) 6
Graham v. Marshall, Civ. T-73-77 (N.D. Fla., Tallahassee Div.) 41
Griffin v. School Board of Prince Edward County, 377 U.S. 218 (1964) 5, 10, 40

Hans v. Louisiana, 134 U.S. 1 (1890) 19, 36, 37
Hawaii v. Gordon, 373 U.S. 57 (1963) 10
Henry v. Mississippi, 379 U.S. 443 (1965) 43

Jordan v. Weaver, 472 F.2d 985 (7th Cir. 1973) 6

Katzenbach v. Morgan, 384 U.S. 641 (1966) 6
Krause v. Rhodes, No. 72-1318 2

Marbury v. Madison, 1 U.S. (Cranch) 137 (1803) 29
McCoy v. Louisiana State Board of Education, 345 F.2d 720 (5th Cir. 1965) 40
Mitchum v. Foster, 407 U.S. 225 (1972) 15
Monroe v. Pape, 365 U.S. 167 (1961) 21, 31, 32
Moultrie v. Georgia 39

Orleans Parish School Board v. Bush, 242 F.2d 156 (5th Cir. 1957) 40
Osborn v. The Bank of the United States, 22 U.S. (9 Wheat.) 739 (1824) 15, 30

PAGE

Parden v. Terminal R.R. of Alabama Docks Department, 377 U.S. 184 (1964) 11
Perez v. Ledesma, 401 U.S. 82 (1971) 10, 38
Pollard v. United States, Civil Action No. 4126-N (M.D. Ala.) 41
Proutt v. Starr, 188 U.S. 537 (1903) 30

Rhode Island v. Massachusetts, 37 U.S. (12 Peters) 657 (1833) 36
Richardson v. State Board of Law Examiners (Civil Action No. 72-1219, D.S.C.) 41
Rosado v. Wyman, 397 U.S. 397 (1970) 5
Rothstein v. Wyman, 303 F. Supp. 339 (S.D.N.Y. 1969) 6

Scheuer v. Rhodes, No. 72-914 2
School Board of Charlottesville v. Allen, 240 F.2d 59 (4th Cir. 1956) 40

United States v. Peters, 9 U.S. (5 Cranch) 115 (1809) 25

Virginia Coupon Cases, 114 U.S. 269 (1885) 11

Wainwright v. State of Florida Department of Transportation, Civ. No. 73-42 (N.D. Fla. Mariana Div.) 41

Zwickler v. Koota, 389 U.S. 241 (1967) 15

Statutes and Regulations:

28 U.S.C. § 1331 ..... 36, 39
42 U.S.C. § 1382(a)(8) 5
42 U.S.C. § 1981 ..... 28, 41
42 U.S.C. § 1983 ..... 21, 28, 32, 33, 34, 39, 41

PAGE

Civil Rights Act of 1964 ..... 5, 41

Civil Rights Act of 1871 ..... 21, 27, 31

Civil Rights Act of 1866 ..... 20, 26, 30

Judiciary Act, section 25 15

12 Stat. 765 23

14 Stat. 9 23

14 Stat. 27 27

17 Stat. 13 27

Articles of Confederation 24

45 C.F.R. § 106.10(3) 5

Other Authorities:

Cong. Globe, 38th Cong. 1st Sess. 19, 23

Cong. Globe 39th Cong. 1st Sess. 16, 17, 20, 21, 26, 30, 31, 32, 33, 37

Cong. Globe, 42nd Cong. 1st Sess. 17, 21, 27, 31, 33, 37

The Federalist, No. 16 ..... 24, 25

The Federalist, No. 31 14

The Federalist, No. 81 ..... 13, 14, 19, 25

Flack, The Adoption of the Fourteenth Amendment (1908) 38

Jacobs, The Eleventh Amendment and Sovereign Immunity (1972) 9, 11, 14, 25, 26, 30, 36, 39

Morrison, The Oxford History of the American People (1965) 26

PAGE

Schlesinger and Israel, The State of the Union Messages of the Presidents (1966) 22

ten Broek, Equal Under Law (1965) 17, 30, 32

Graham "The 'Conspiracy Theory' of the Fourteenth Amendment," 47 Yale L.J. 371 (1938) 30

Graham, "The Early Antislavery Backgrounds of the Fourteenth Amendment" 1950 Wis. L. Rev. 479 30

Memorandum of Administrator, Social and Rehabilitation Service, dated April 1, 1971 28

IN THE

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OCTOBER TERM 1973

No. 72-1410

JOEL EDELMAN, etc.,

Petitioner,

—v.—

JOHN JORDAN, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

Statement of Interest of the *Amicus Curiae*[1]

Amicus N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on

[1] Both the Petitioner and the Respondent have consented to the filing of this brief. Copies of their letters have been filed with the Clerk.

their own behalf. The charter has been approved by a New York Court, authorizing the organization to serve as a legal aid society. The N.A.A.C.P. Legal Defense and Educational Fund, Inc. (LDF) is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties before this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts.

For many years LDF attorneys have represented plaintiffs in actions against state officials and state agencies seeking redress of violations of the Thirteenth, Fourteenth and Fifteenth Amendments. This litigation has challenged state discrimination in such disparate areas as education, public employment, voting, public assistance, public housing, and the administration of justice.

In the instant case the named plaintiff claimed the defendant had violated both the Fourteenth Amendment and a federal statute and regulation implementing that Amendment, and prevailed on the latter ground. The case thus requires the Court to consider the applicability of *Employees* v. *Department of Public Health and Welfare*, 411 U.S. 279 (1973) to state action violating the Fourteenth Amendment or implementing legislation.[2] The decision will necessarily have a substantial effect on the extent to which the prohibition against certain state action contained in the Thirteenth, Fourteenth and Fifteenth Amendments will remain enforceable in federal courts. Thus the Amicus has a vital interest in the present case, one beyond that of the immediate litigants, and therefore presents in the attached brief an alternative argument in support of the respondents' position.

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[2] See also *Krause* v. *Rhodes*, No. 72-1318; *Scheuer* v. *Rhodes*, No. 72-914.

Summary of Argument

This action arises under a federal statute and regulation which protect rights arising under the Fourteenth Amendment, particularly the guarantees of equal protection and due process of law.

This Court has long recognized that neither sovereign immunity nor the Eleventh Amendment should be allowed to prevent enforcement of the Reconstruction Amendments. The legal fiction of *Ex Parte Young*, 209 U.S. 123 (1908) was established to avoid a direct conflict between the Eleventh Amendment and the Thirteenth, Fourteenth and Fifteenth Amendments. When a conflict cannot be avoided in this manner the need to enforce the more recent and specific provisions of the Reconstruction Amendments must prevail over the Eleventh Amendment.

Sovereign immunity, as its eighteenth century and recent supporters conceded, is merely a procedural protection for the sovereign power of the states. It allows the states to conduct their affairs without threat of judicial interference. That immunity has no application, however, to state discrimination which violates the Reconstruction Amendments, for those Amendments stripped the states of their sovereign power to engage in such discrimination.

The primary justification for sovereign immunity and the Eleventh Amendment has traditionally been that the sovereign, state or federal, could be relied on to do justice to all claimants without judicial compunction. The Reconstruction Amendments, however, were founded on the premise that the states could not be trusted to respect and protect the basic rights of freedmen and others.

Hamilton and other federalists who supported passage of the Eleventh Amendment were concerned that Federal

judicial control over the states might lead to serious and even armed confrontation between the states and the federal government when enforcement was sought. But the Congress which framed the Reconstruction Amendments was not unwilling to resort to such drastic measures if necessary. When the Amendments were enacted the country had just ended a civil war over the principles contained therein, and federal troops were stationed throughout the south to protect freedmen and others. It is hardly likely that those who framed the Amendments had great compunctions about resort to measures which had troubled Hamilton and others seventy years earlier.

If the states could assert sovereign immunity or the Eleventh Amendment to bar effective relief, aggrieved citizens would have a right without a remedy. While such a situation may be appropriate under special circumstances, it is intolerable where the rights involved arise under the Reconstruction Amendments. Those Amendments were expressly regarded as remedial in nature; the men who framed them believed the rights described already existed under the Constitution, and were primarily concerned to provide a remedy where none had existed before.

The states may of course consent to be sued in federal court. When the Reconstruction Amendments were enacted every such creation of a federal right involved, under the decisions of this Court, *pro tanto* waiver of sovereign immunity because of the federal question provision of Article III. *Cohens* v. *Virginia*, 19 U.S. 264 (1821). Thus by ratifying the Reconstruction Amendments the states waived their Eleventh Amendment and sovereign immunity defense.

Throughout the last several decades states sued for violations of the Reconstruction Amendments, particularly the Fourteenth, have sought to defend their right to discriminate by claiming immunity from suit. This Court has

rejected such claims. *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218 (1964). However, this Court's recent decision in *Employees* v. *Missouri Public Health Department*, 411 U.S. 279 (1973), has suggested that there may be some vitality in this defense to constitutional litigation. Sovereign immunity and the Eleventh Amendment have already been used to call into question the constitutionality of claims against a state for back pay under Title VII of the 1964 Civil Rights Act, and to insulate state officials from personal liability for willful discriminatory acts. A clear statement from this Court is needed that neither sovereign immunity nor the Eleventh Amendment may be asserted to prevent effective relief for violations of the Thirteenth, Fourteenth and Fifteenth Amendments.

Statement of the Case

This is an action challenging, as violative of both the Fourteenth Amendment and the applicable federal statute and regulations, Illinois' failure to process promptly certain applications for public assistance. The courts below resolved this question in favor of the plaintiffs on the ground that the state was not in compliance with those federal regulations, which require that eligibility determinations be made within thirty (30) days on applications for aid to the aged and blind and within sixty (60) days on applications for assistance to the disabled. See *Rosado* v. *Wyman*, 397 U.S. 397 (1970). It is however, clear that the federal statute[3] and regulation[4] involved in this case, serve to protect the constitutional rights to equal protec-

[3] 42 U.S.C. §1382(a)(8).

[4] 45 C.F.R. §106.10(3).

tion[5] and due process of law[6] guaranteed by the Fourteenth Amendment.

The question before the Court is whether, having concluded that Illinois had been administering public assistance in violation of the law, the federal courts have the power to order the Director of the Illinois Department of Public Aid to pay to past applicants out of public funds the benefits to which they would have been entitled had the state properly administered the law from its inception. The defendant claims that such an order, though on its face directed at him individually, would render this a case against the state of Illinois, which cases are barred by the Eleventh Amendment and the state's sovereign immunity. Plaintiffs urge and the Court of Appeals concluded that the disputed order was proper, both arguing that it fell within the power of the federal courts under *Ex Parte Young*, 209 U.S. 123 (1908), to rectify the conduct of state officials acting in violation of the Constitution or laws of the United States.

While agreeing with the position taken by the plaintiffs regarding *Ex Parte Young*, the Amicus would urge that the case be resolved in favor of the plaintiffs on another ground. Defendant maintains that the order requiring back

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[5] The state's failure to process all applications promptly yielded gross disparities in the actual grants received. *Jordan* v. *Weaver*, 472 F.2d 985, 998 (7th Cir. 1973). These unjustifiable variances raise serious questions of equal protection. See *Rothstein* v. *Wyman*, 303 F.Supp. 339 (S.D.N.Y. 1969), vacated on other grounds, 398 U.S. 275 (1970).

[6] The right to a prompt hearing and decision is an essential part of due process. Whether a decision denying, as opposed to terminating, welfare entitlements is a taking of property or even a deprivation of liberty, is a question of no small difficulty. See *Goldberg* v. *Kelly*, 397 U.S. 254, 262 n.8 (1970). This is, however, precisely the sort of question which Congress has authority, under section 5 of the Fourteenth Amendment, to resolve in favor of the individual. See *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966).

payment of benefits, though nominally directed to a state official, is really an order against the state. There is no claim that the Director of the Department of Public Aid has sufficient personal funds to make these back payments; the only way in which adequate relief can be obtained is if the Director releases benefits wrongfully withheld at an earlier time. Thus if, as defendant asserts, the disputed order is improper, there would be no way in which a violation of the statute and regulation could be remedied.[7]

The Amicus maintains, for the reasons set out below, that neither sovereign immunity nor the Eleventh Amendment may be asserted to bar an effective remedy for a violation of the Thirteenth, Fourteenth and Fifteenth Amendments, or of legislation implementing those provisions. This being so, it is unnecessary to decide whether this case is, in effect, a suit against the state, for even if it were the state could not obstruct the granting of meaningful relief. Amicus suggests that it may be preferable to decide the case on this basis, rather than attempting an exposition of *Ex Parte Young* which might not be limited to litigation arising under the Reconstruction Amendments.

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[7] The United States Department of Health, Education and Welfare has taken the position that it lacks the power to compel the state to make such back payments.

ARGUMENT

I.

Neither the Eleventh Amendment nor sovereign immunity may be asserted to prevent effective relief for a violation of the Thirteenth, Fourteenth or Fifteenth Amendments.

A. The specific and more recent provisions of the Reconstruction Amendments must prevail over sovereign immunity and the earlier general language of the Eleventh Amendment.

The potential conflict between the Reconstruction Amendments on the one hand and the Eleventh Amendment on the other is apparent on the face of those provisions. While the Fourteenth and Fifteenth Amendments expressly, and the Thirteenth tacitly, create special rights in favor of private individuals and limit the power of the states, the Eleventh Amendment withdraws from the federal judicial power cases brought against one state by the citizen of another. Manifestly enforcement of those special rights against one state by the citizen of another would require precisely the remedy which the Eleventh Amendment appears to preclude. Similarly any doctrine of sovereign immunity, allowing the states to refuse to be sued by their own citizens, seems on its face inconsistent with the express grant of rights against the states to those citizens.

This Court has not heretofore been required to decide which principle should prevail if the only method of enforcing the post-Civil War Amendments is the type of action against the state usually precluded by sovereign immunity and the Eleventh Amendment. In *Ex Parte Young*, this Court expressly declined to decide whether the Fourteenth Amendment limited the effect of the Eleventh.

209 U.S. 123, 150 (1908).[8] Rather than reach that question, this Court has consistently sought to fashion remedies for violations of the Thirteenth, Fourteenth and Fifteenth Amendments which would not require transgressing the usual limitations on suits against the states. *Ex Parte Young* itself was the most important such remedy; while suits against state officers had, to a limited extent, been sanctioned before, *Young* worked a substantial expansion of that mode of relief. See *Jacobs, The Eleventh Amendment and Sovereign Immunity* 138-146 (1972).[9]

The policy considerations behind *Ex Parte Young* were expressly detailed in an opinion handed down the same day in *General Oil Company* v. *Crain*, 209 U.S. 211, 226-27 (1908):

> Necessarily, to give adequate protection to constitutional rights a distinction must be made between valid and invalid state laws, as determining the character of the suit against state officers. And the suit at bar illustrates the necessity. If a suit against state officers is precluded in the national courts by the 11th Amendment to the Constitution, and may be forbidden by a state to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution; and the 14th Amendment, which is directed at state action, could be nullified as to much

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[8] "We think that, whatever the rights of complainants may be, they are largely founded upon that [Fourteenth] Amendment, but a decision in this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier [Eleventh] Amendment."

[9] *Ex Parte Young* represented a substantial departure from the Court's earlier decisions in *Ex Parte Ayers*, 123 U.S. 443 (1887) and *Fitts* v. *McGhee*, 172 U.S. 516 (1899).

> of its operation. . . . The swift execution of the law may seem the only good, and the rights and interests which obstruct it be regarded as a kind of outlawry. See *Ex Parte Young*, where this subject is fully discussed and the cases reviewed.

Young represented, at the time it was decided, "the culmination of the efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." *Perez* v. *Ledesma*, 401 U.S. 82, 106 (1971) (Brennan, J. concurring and dissenting).

The Court's unwillingness to permit the Eleventh Amendment or sovereign immunity to preclude effective relief in cases such as this was further illustrated in *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218 (1964). *Ex Parte Young* had stressed that the relief sought there was entirely preventative, and did not require "affirmative action of any nature." 209 U.S. at 159. Barely a year before *Griffin* this Court had reiterated, in two cases involving purely statutory causes of action, that a suit nominally against an officer was in fact a suit against the sovereign if affirmative action or the expenditure of public funds were the relief sought. *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963); *Hawaii* v. *Gordon*, 373 U.S. 57, 58 (1963)[10] Since the relief sought in *Griffin* included reopening and funding the public schools of Prince Edward County, the defendants urged at length that the case was one against

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[10] Both *Dugan* and *Gordon* were actions involving the United States, to which the government objected on the grounds of sovereign immunity. *Dugan* questioned the statutory authority of the Secretary of the Interior to operate a particular water reclamation project. 372 U.S. at 615. *Gordon* involved the construction of a statute regarding the status of federally owned land in Hawaii. 373 U.S. at 57.

the state and thus barred by the Eleventh Amendment. 12 L.Ed. 2d 1106-1109; *Jacobs, The Eleventh Amendment and Sovereign Immunity*, 156-159 (1972). This Court, noting that the complaint alleged a violation of constitutional rights protected by the Fourteenth Amendment, summarily rejected this objection. 377 U.S. at 228.[11]

The considerations underlying *Young* and *Griffin* suggest that, while suits against a state should not be permitted when any other adequate remedy exists, if no such other relief is possible and such a choice cannot be avoided, vindication of the rights created by the Reconstruction Amendments must be given priority over the policies underlying the Eleventh Amendment and sovereign immunity. Such a case is very different from commonplace suits asserting essentially state law claims against the state, *Parden* v. *Terminal R.R. of Alabama Docks Dept.*, 377 U.S. 184, 187 n.3 (1964), or in which the federal question does not involve the vindication of constitutionally protected rights. See *Employees* v. *Department of Public Health and Welfare*, 411 U.S. 279 (1973). This conclusion is supported by the ordinary rule of construction stated by Mr. Justice Bradley in *The Virginia Coupon Cases*,

> If the Contract Clause and the Eleventh Amendment come into conflict, the latter has paramount force. It was adopted as an amendment to the Constitution, and operates as an amendment of every part of the Constitution to which it is at any time found to be repug-

[11] The Court's entire discussion of this matter was contained in but three sentences. "It is contended that the case is an action against the State, is forbidden by the Eleventh Amendment, and therefore should be dismissed. The complaint, however, charged that state and county officials were depriving petitioners of rights guaranteed by the Fourteenth Amendment. It has been settled law since *Ex Parte Young*, 209 U.S. 123 . . . (1908), that suits against state and county officials to enjoin them from invading constitutional rights are not forbidden by the Eleventh Amendment."

> nant . . . It is the last declared will of the law-maker, and has paramount force and effect. 114 U.S. 269, 331 (1885) (dissenting opinion).

In the instant case, of course, it is the Reconstruction Amendments which represent the last declared will of the law-maker. Moreover, while the Eleventh Amendment and sovereign immunity deal in a general fashion with all disputes between individuals and states, the Thirteenth, Fourteenth and Fifteenth Amendments deal more narrowly with the creation of certain specific rights. In the case of a conflict such as this the more specific provision usually controls. *Chicago, etc. R.R. Co.* v. *United Transportation Union*, 402 U.S. 570, 582 (1971).

B. Sovereign immunity has no application to activities which the Reconstruction Amendments placed outside the sovereign power of the States.

Sovereign immunity, the doctrine that a state cannot be sued without its consent, is but a procedural incident to sovereignty itself, the right and power of a state to conduct its affairs in whatever manner it sees fit and without outside limitations. Sovereign immunity serves to protect the state, particularly the executive branch, in the exercise of this power from control or regulation by the judiciary.

In the discussions of sovereign immunity at the end of the eighteenth century, particularly those leading to the embodiment of that immunity in the Eleventh Amendment, the question of whether and to what extent a state had sovereign immunity was understood to turn on whether and to what extent the state itself was sovereign. The most important judicial exposition of the case for sovereign immunity is Justice Iredell's historic dissent in *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419, 429 (1793). Justice Iredell

reasoned that the state had, subject to certain limitations, succeeded to the sovereignty of the King, and that the immunity from suit attendant to this sovereignty had not been waived or lifted by Article III of the Constitution:

> No other parts of the common law of England, it appears to me, can have any reference to this subject, but that part of it which prescribes remedies against the crown. Every state in the union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of government actually surrendered. Each state in the union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the states have surrendered to them. Of course the part not surrendered must remain as it did before.

The other members of the Court, while concluding that Georgia could not claim immunity, agreed that procedural immunity and substantive sovereignty were inseparable.[12] Hamilton, in the oft quoted argument for immunity in *The Federalist*, was also of the view that immunity derived from, and could not be asserted in the absence of, state sovereignty:

> It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its

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[12] Justice Blair concluded that the states had waived both sovereignty and immunity by ratifying Article III. 2 U.S. at 452. Justice Cushing believed that Article III had abridged the sovereignty of the states and with it their immunity. Id. at 468. Justice Wilson and Chief Justice Jay maintained the state had no immunity because the people, not the state, were the sovereign. Id. at 453-466, 469-479.

> consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the Government of every State in the Union. Unless therefore, there is a surrender of this immunity in the plan of the Convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty, were discussed in considering the Article of taxation, and need not be repeated here. (Number 81).

The discussion of taxation, contained in *The Federalist* No. 31, dealt with the extent to which the states had surrendered their *power* to enact certain types of taxes.[13]

Justice Iredell rejected the suggestion that the states had never been sovereign or that that sovereignty had been waived by ratifying Article III of the Constitution creating federal jurisdiction over actions between a state and a citizen of another state. See *Jacobs, Sovereign Immunity and the Eleventh Amendment,* 64-74 (1972). But both Iredell and Hamilton conceded state sovereignty could be lost by a substantive constitutional limitation on the powers of the states and that, in such a case, immunity would fail as well.

At the time this was a theoretical concession of no practical consequence. The Constitution as it existed prior to the Civil War contained few significant limitations on the

[13] The same connection between the state's power and procedural immunity is reflected in the opinions in *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279 (1973). Justice Douglas' opinion equates lifting immunity with "lifting the sovereignty of the States." 411 U.S. at 287. Justice Marshall's opinion derives the principle of immunity from "the inherent nature of sovereignty," id., as does that of Justice Brennan, 411 U.S. at 317.

sovereignty of the states in dealing with individual citizens. The concept of federalism prevailing at that time left largely in the hands of the states decisions as to what basic rights, if any, individuals should have against state action, and how, if at all, those rights should be enforced. The national government assumed no substantial role under the Constitution in regulating the internal affairs of the states; such matters were conceived to properly be consigned to the exclusive jurisdiction of the states, and any federal interference would have transgressed the rights and reserved powers of the states. Disputes between states and individuals raising federal questions could reach the federal courts only under Section 25 of the Judiciary Act, providing for review in this Court. The few such cases which did reach this Court involved, not violations of federally protected rights, but state actions interfering with the conduct of the national government. See, e.g., *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821). So long as the states' sovereignty in dealing with individual citizens remained intact, the immunity incident to that sovereignty was entirely appropriate.

In the decade following the Civil War this situation was deliberately and drastically altered by adoption of the Thirteenth, Fourteenth and Fifteenth Amendments, which expressly limited the power of the states in their relations with private citizens. Those enactments, together with the statutes enforcing them, created a panoply of federal rights designed to implement the new national commitment to racial justice. Congress clearly conceived that it was altering the relationship between the states and the nation, and working a "vast transformation" from the concepts of federalism that had prevailed in the late 18th century. *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972); *Zwickler* v.

Koota, 389 U.S. 241, 245-46 (1967). The effect of those Amendments was to overturn several of this Court's earlier decisions regarding the rights of individuals against the states and the ability of the national government to protect those rights. See *Barron* v. *Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1857).

The changes wrought by the Reconstruction Amendments were understood to work a substantial restriction on the prior sovereignty and reserved rights of the states, and were opposed on just this ground. Congressman Edgerton, speaking against the Thirteenth Amendment, argued:

> Better, sir, for our country, better for man, that negro slavery exist a thousand years than that American white men lose their constitutional liberty in the extinction of the constitutional sovereignty of the Federal States of the Union. Cong. Globe, 39th Cong. 1st Sess. 2987.[14]

Congressman Rogers, opposing the 1866 Civil Rights Bill, the provisions of which were later codified in Section 1 of the Fourteenth Amendment, urged:

> I ask you to stand by the law of the country and to regulate these Federal and State systems upon the grand principles upon which they were intended to be regulated, that we may hand down to those who are to come after us this bright jewel of civil liberty unimpaired; and I say that the Congress or men who will strip the people of these rights will be handed down to perdition for allowing this bright and beautiful

[14] See also id. at 1366 (Remarks of Senator Saulsbury), 2939 (Remarks of Congressman Pruyn), 2941 (Remarks of Congressman Wood), 2943 (Remarks of Congressman Higby), 2962 (Remarks of Congressman Holman), 2994 (Remarks of Senator Pendleton).

heritage of civil liberty embodied in the powers and sovereign jurisdiction of the States to pass away from us. Cong. Globe, 39th Cong. 1st Sess. 1122-23.[15]

Congressman Shanklin protested that the Fourteenth Amendment struck down "the reserved rights of the states." Cong. Globe, 39th Cong. 1st Sess. 1865-66.[16] Such objections, however, were to no effect, for such a restriction on state power and sovereignty was precisely the goal of the proponents of these measures who believed that the rights of the states ought not include "the right to defeat the very object for which all government is made . . . to inflict wrongs on free citizens by a denial of the full protection of the laws." Cong. Globe, 42nd Cong. 1st Sess. 84-85 App. (Remarks of Congressman Bingham).[17]

The Reconstruction Amendments created precisely the circumstance in which Iredell and Hamilton had agreed

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[15] See also id. at 604 (Remarks of Senator Cowan), 1415 (Remarks of Senator Davis), 1174 (Remarks of Congressman Rogers), 1156 (Remarks of Congressman Thornton).

[16] See also id. at 2530 (Remarks of Congressman Randall), 2538 (Remarks of Congressman Rogers), 3147 (Remarks of Congressman Harding).

[17] "From the beginning, the program for the protection of men in their civil rights encountered the destruction of federalism argument. The Thirteenth Amendment, the first constitutional expression of that program, was proposed, encountered the federalism objection, and was adopted anyway. Next, the civil rights bill, designed to implement the Thirteenth Amendment, had heaped upon it the same charge. It was adopted notwithstanding. Then, at last, came the Fourteenth Amendment, created to accomplish what the Thirteenth Amendment had been designed to do but had failed to do because of the continuation of the federalism objection, intended to remove from the Civil Rights Act the constitutional doubts arising from the federalism objection to it, the Fourteenth Amendment was itself, in turn, subjected to the very same criticisms. Despite that criticism, it too was adopted." *ten Broek, Equal Under Law* 219-220 (1965).

immunity had no place, by stripping the states of their hitherto existing sovereign power to sanction slavery, deny equal protection or due process of the laws, or abridge the right to vote on account of race. In the limited areas prescribed by these Amendments the states have no authority the free exercise of which can be protected from litigation, and in such case the purpose underlying sovereign immunity and the Eleventh Amendment cannot be served.

C. The purposes of sovereign immunity and the Eleventh Amendment are inconsistent with the purposes of the Reconstruction Amendments.

While sovereign immunity was properly conceived as no more than an incident to sovereignty itself, the grant of immunity, particularly within a federal system, reflected a number of policies other than the mere protection of sovereignty itself. The policies which immunity would advance are, however, the very policies expressly rejected by Congress when it approved the Thirteenth, Fourteenth and Fifteenth Amendments.

1. *Reliance on state enforcement*

Advocates of sovereign immunity both before and after passage of the Eleventh Amendment urged that judicial jurisdiction over claims against a sovereign was unnecessary because the King, or the executive and legislative branches of a state government, could and would do justice in any case brought to their attention. In England, Iredell argued, while the resolution of such grievances was technically at the discretion of the crown, it was the King's practice, through the Chancellor, to do whatever justice required. "If any person has, in point of property, a just demand upon a King, he must petition him in his court of chancery, where his chancellor will administer right,

as a matter of grace, though not upon compulsion." *Chisholm* v. *Georgia,* 2 U.S. 419, 442 (1793). A citizen with a claim against a state, it was said, could rely on the legislature's good faith and sense of public duty. 2 U.S. at 445-6. Hamilton urged that contracts between a nation and an individual were binding, not in a court of law, but "on the conscience of the sovereign." *The Federalist,* No. 81. The argument was reiterated by Congressman Diven in 1862 urging retention of sovereign immunity by the federal government.

> Now, sir, what is the theory with regard to the satisfaction of claims against Governments? Why it is this: that Governments are always disposed to deal justly with their subjects; that Governments are never required or compelled by legal process to render justice to their subjects; and that they are always ready to do right when the right is ascertained; and the only object of a Court of Claims should be to aid the Government in determining what is right, and then the Government will do right always. That is the theory of government. It was a maxim of the common law that "the King can do no wrong," and it is the theory that Governments can do no wrong, that exempts them from this trial in courts to compel them to do right to their own citizens. It is false in theory to suppose that when an individual has a just claim against the Government it is necessary for him to sue the Government in a court of law to recover it. Cong. Globe, 38th Cong. 1st Sess. 1672.

This Court, in *Hans* v. *Louisiana,* 134 U.S. 1, (1890), reasoned that a state could be relied on to respect "the highest demands of natural and political law to preserve justice," and that the security for state loans "is the plighted faith of the State." 134 U.S. at 16, 21.

When the Reconstruction Amendments and legislation were proposed, opponents objected that such measures were unnecessary, and that reliance could be placed on the "honest purpose of the several States" to protect the rights of citizens. Cong. Globe, 39th Cong. 1st Sess. 1294 (Remarks of Congressman Wilson). The conclusion of the Congress and the nation, however, was to the contrary: in particular that the southern states could not be relied upon to respect and protect the rights of freedmen. Speaking in favor of the 1866 Civil Rights Bill, whose principles were soon incorporated in Section 1 of the Fourteenth Amendment, Representative Wilson explained:

> If the States would all observe the rights of our citizens, there would be no need for this bill . . . If they would recognize that "general citizenship" . . . which under this [privileges and immunities] clause entitles every citizen to security and protection of personal rights, . . . we might safely withhold action. And if above all, Mr. Speaker, the States should admit, and practice the admission, that a citizen does not surrender these rights because he may happen to be a citizen of the State which would deprive him of them, we might, without doing violence to the duty devolved upon us, leave the whole subject to the States. But, sir, the practice of the States leaves us no avenue of escape, and we must do our duty by supplying the protection which the States deny. Cong. Globe, 39th Cong. 1st Sess. 1117-18.

Congressman Cook argued

> Suppose . . . these States are restored to all the rights of sovereign States within this Union, and they carry out the same spirit they have already manifested toward these freedmen. . . . It is idle to say these men

> will be protected by the States. The sufficient and conclusive answer to that position I submit is, that those States have already passed laws which would now virtually reenslave them . . . Does any man in this House believe that these people can be safely left in these States without the aid of Federal legislation or military power? Does anyone believe that their freedom can be preserved without this aid? If any man does so believe, he is strangely blind to the enactments passed by legislatures touching those freed men. Id. at 1124-25.[18]

Six years of experience after the Civil War served only to confirm Congress' fears in this regard, and the 1871 Civil Rights Act, including the predecessor of Section 1983, was enacted "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe* v. *Pape,* 365 U.S. 171, 179 (1961). The "plighted faith of the States" which this Court has found an adequate alternative to judicial enforcement of the contract clause in *Hans,* was expressly rejected as a sufficient guarantee of the rights of freedmen and others under the Reconstruction Amendments. Cong. Globe, 42nd Cong. 1st Sess. 85 (Remarks of Congressman Bingham).

The Congress which approved the Thirteenth, Fourteenth and Fifteenth Amendments, had only a few years earlier ended the sovereign immunity of the federal gov-

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[18] See also id. at 503 (Remarks of Senator Howard), 602 (Remarks of Senator Lane).

ernment. In his first State of the Union message, President Lincoln had urged abolition of that immunity:

> It is important that some more convenient means should be provided, if possible, for the adjustment of claims against the Government especially in view of their increased number by reason of the war. It is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals. The investigation and adjudication of claims in their nature belong to the judicial department.[19]

The debates on this proposal centered on whether or not the federal government was already providing a prompt and just resolution of claims against it, the procedure until that time being for Congress to enact a special appropriation in the amount it felt fair. Proponents of immunity urged such justice was already being done. See p. 19, supra. A majority of the Congress, however, concluded otherwise. Congressman Pendleton responded to the remarks of Congressman Diven quoted above,

> My colleague on the committee has told us today that, in theory, the Government is always willing to do justice to the citizen, that it is always willing to do that which equity and justice requires it to do. Now, sir, that is very good in theory, but it is very bad in practice, and when that gentleman has had experience in examining the claims brought against this Government year after year . . . he will find that there are innumerable claims on the calendar which have been examined and re-examined session after session . . . If the Government of the United States owes a debt to

[19] *Schlesinger and Israel, The State of the Union Messages of the Presidents*, v. 2, 1060 (1966).

> a citizen of the United States, why should that citizen be forced to come to Congress year after year, and spend his time and his money in besieging individual members, in order to show to them the justice of his claim, depending, in the end, even in the justest case, not upon its merits, but upon their patience to hear him fully, and their impartiality to judge fairly. Cong. Globe, 38th Cong. 1st Sess. 1675.

Congressman Bingham, the author of the Fourteenth Amendment, urged that the abolition of immunity would end the injustice of denying relief to citizens with legitimate grievances, and the corruption of the Congress by lobbyists pressing dubious claims. Id. at 1674. The statute conferring binding jurisdiction on the Court of Claims was enacted in 1863, 12 Stat. 765, and the remedies available to citizens broadened further in 1866. 14 Stat. 9.

The existence of a sovereign immunity defense in an action under the Reconstruction Amendments is manifestly incompatible with the purpose and background of those constitutional provisions. It cannot plausibly be urged that Congress first established a panoply of federal rights and remedies on the ground that the states *would not* voluntarily protect those rights, and yet intended to permit the states to avoid judicial enforcement of those rights on the grounds that the states *would* voluntarily protect such rights and that judicial enforcement was thus unnecessary. The same state legislature which enacted a discriminatory measure could hardly be expected, in response to the claims of its victims, to repeal that measure and appropriate funds to compensate them for any injuries suffered. Whatever support sovereign immunity may have commanded in the 1790's, by the 1860's Congress shared Lincoln's view that the courts were the most fair and efficient forum for resolving claims against the government.

2. *Problems of federal enforcement*

Federal jurisdiction over litigation against the states was opposed in the eighteenth century because of problems of enforcement which might arise. One of the great failings of the Articles of Confederation was that under it the national government could carry out its desires and policies only through the action and good will of the states. If a state was not amenable to this process, the two levels of government were necessarily arrayed directly against each other, at best resulting in a cumbersome process and at worst threatening more serious conflict. The federalists sought to give the national government power to carry out its policies directly, rather than relying on or resorting to action against the states. It was to avoid the need to coerce the states into compliance that the new constitution was designed. Under a continuation of a confederacy, Hamilton warned, resort to such a military coercion was inevitable.

> If there should not be a large army constantly at the disposal of the National Government, it would either not be able to employ force at all, or when this could be done, it would amount to a war between parts of the Confederacy, concerning the infractions of a league; in which the strongest combination would be most likely to prevail, whether it consisted of those who supported, or those who resisted, the general authority. It would rarely happen that the delinquency to be redressed would be confined to a single member; and if there were more than one, who had neglected their duty, similarity of the situation would induce them to unite for common defense. *The Federalist,* No. 16.

But, Hamilton pointed out,

> If the execution of the laws of the National Government should not require the intervention of the State

> Legislatures; if they were to pass into immediate operation upon the citizens themselves, the particular Governments could not interrupt their progress without an open and violent exertion of an unconstitutional power. *Id.*

Such affirmative efforts to obstruct enforcement of national laws were thought highly unlikely.

It was this same consideration which, for the federalists, militated against federal jurisdiction over the states. Hamilton himself pressed this argument in the oft quoted passage in *The Federalist* on the meaning of Article III of the proposed constitution:

> To what purpose would it be to authorize suits against the States for the debts they owe? How could recovery be enforced? It is evident, it could not be done, without waging war against the contracting State, and to ascribe to the Federal Courts, by mere implication, and in destruction of a pre-existing right of the State Governments, a power which would involve such a consequence, would be altogether forced and unwarrantable. *The Federalist,* No. 81.

The fear that such jurisdiction over the states might lead to the use of force was, at the time, not unwarranted. In the face of *Chisholm,* the Georgia House of Delegates passed a statute making any effort by a federal marshal to enforce a judgment for Chisholm a felony punishable by death without benefit of clergy. *Jacobs, The Eleventh Amendment and Sovereign Immunity,* 56-57 (1972). In another private action in 1809 seeking to collect funds held by the heirs of the state treasurer of Pennsylvania, decided *sub nom. United States* v. *Peters,* 9 U.S. (5 Cranch.) 115 (1809), the governor deployed the state militia around the

home of the heirs to prevent execution of the judgment. The United States marshal enlisted a posse, and an armed clash was averted only when the state relented in the face of direct threats by President Madison. *Jacobs, The Eleventh Amendment and Sovereign Immunity,* 77-80 (1972).

It cannot plausibly be maintained that those who framed the Reconstruction Amendments and civil rights legislation would have opposed suits against the states on the ground that force might be required to enforce the resulting court orders. Throughout the period when these measures were being enacted the armed forces of the federal government, with the enthusiastic support of Congress, were stationed throughout the former rebel states and were deeply involved in administering and policing those areas. See *Morrison, The Oxford History of the American People,* 717-725 (1965). After a four-year Civil War of unprecedented cost, the willingness of the national government to resort to force to preserve the fruits of its victory cannot be doubted. During the debates on the 1866 Civil Rights Bill, Congressman Thayer openly expressed this willingness:

> Why have laws if Government has not the physical force and strength to enforce them? Enforce them if you can through the forms of judical procedure and by the ordinary means at the command of judicial tribunals as this bill provides: but if there are combinations against the peaceful enforcement of these laws, why should not the military power of the United States, in pursuance of the express power given in the Constitution, come to the rescue of the civil power in order to enforce a law solemnly promulgated by the people of the United States? Cong. Globe, 39th Cong. 1st Sess. 1153.

Senator Pool expressed the same conviction six years later in support of the 1871 Civil Rights Act regarding the constitutional guarantee of equal rights:

> If the states shall fail to secure and enforce this right of the colored man, and deny to him protection in the free exercise of it as a citizen of the State, then the United States, by virtue of his national citizenship, must and will, by appropriate legislation, by all the power of its courts, by its land and naval forces, extend over him within the States the shield of the national authority. . . . I yet hope it is possible to escape more violent means by a prompt resort to the ordinary federal tribunals of justice. Unless that resort be promptly and efficiently taken, there is no hope of escaping for another year the application of the most stringent and ruinous military measures. Cong. Globe, 42nd Cong. 1st Sess. 609.

Both civil rights acts contained express provisions for resort to military rule if civil measures proved inadequate to protect the rights of the freedmen. See 14 Stat. 27; 17 Stat. 13.

To suggest that suits against the states under the Reconstruction Amendments should be forbidden to avoid problems of enforcement would be to ignore the fact that the congresses which framed those provisions were determined to use whatever measures were necessary to enforce the rights described therein. Nor are suits against state officers any less likely to incur virulent state opposition; the history of the last century, particularly since *Brown*, is studded with instances where extraordinary federal action was necessary to effectuate the decree of a federal court against such officers.

3. *Remedial purpose of the Reconstruction Amendments*

The defense of sovereign immunity, if allowed in all cases, would operate in some circumstances to deny citizens an effective judicial remedy to enforce their rights. Undoubtedly there are circumstances under which such a normally incongruous situation might be appropriate. Where control of state conduct is not a primary concern of the provisions establishing those rights, it may be that subjecting the states to judicial control is too drastic a method of achieving a largely incidental purpose. Where there is little reason to doubt the states will voluntarily comply with the federal requirements, Congress might conclude that harmonious federalism would best be served by trusting the states to act without threat of litigation. And where a fully effective means of enforcement less drastic than federal litigation is available, the necessity for such litigation might be doubted. See generally *Employees* v. *Department of Public Health and Welfare,* 411 U.S. 279 (1973).

None of these factors, however, are present here. Control of the states was not a merely incidental effect of the Reconstruction Amendments, it was the primary concern and goal. See *The Civil Rights Cases,* 109 U.S. 7 (1883). The Department of Health, Education and Welfare has taken the position that it lacks authority to compel payment of back benefits in a case such as this,[20] and enforcement of the Reconstruction Amendments has traditionally been left primarily in the hands of private litigants. See 42 U.S.C. §§1981-1983. Those amendments and the contemporaneous legislation were founded on the conviction that the states could not be relied on to voluntarily comply with the law. See pp. 18-23 supra. The men who framed

[20] Memorandum of Administrator, Social and Rehabilitation Service, dated April 1, 1971, pp. 1-2.

those Amendments were primarily concerned, not with preserving the delicate balance of harmonious federalism, but with assuring compliance by the recalcitrant states through whatever means necessary.

This Court has long recognized the particular undesirability of leaving those asserting constitutional rights without an effective remedy. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, wherever he receives an injury." *Marbury* v. *Madison*, 1 U.S. (Cranch) 137, 163 (1803), quoted in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 338, 397 (1971).

> The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual states from suits by citizens of other states, provided or in the 11th Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several states, which forbid the states from entering into any treaty, alliance, or confederation, from passing any bill of attainder, ex post facto law, of law impairing the obligation of contracts or, without the consent of Congress, from laying any duty of tonnage, entering into any agreement or compact with other states, or from engaging in war,—all of which provisions existed before the adoption of the 11th Amendment, which still exist, and which would be nullified and made of no effect if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding those constitutional limitations. Much less can the 11th Amendment be

> successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the 14th Amendment have been disregarded by state enactments. *Prout* v. *Starr,* 188 U.S. 537, 543 (1903).

See also *General Oil Co.* v. *Crane,* 209 U.S. 211, 226-27 (1908); *Osborn* v. *The Bank of the United States,* 22 U.S. (9 Wheat.) 739, 849 (1824); *Jacobs, The Eleventh Amendment and Sovereign Immunity* 144 (1972).

That any rights arising under the Reconstruction Amendments should be without a remedy is particularly inappropriate since these Amendments, especially the Fourteenth, were primarily remedial. The abolitionists who finally won control of the Congress and many states in the 1860's and 1870's had long maintained that the rights described in the Thirteenth, Fourteenth and Fifteenth Amendments already existed, though not recognized, by virtue of the privileges and immunities clause and the Bill of Rights. See generally *ten Broek, Equal Under Law* (1965); Graham, "The Early Anti-slavery Backgrounds of the Fourteenth Amendment" 1950 Wis. L. Rev. 479; Graham, "The 'Conspiracy Theory' of the Fourteenth Amendment," 47 Yale L.J. 371 (1938). Congressman Wilson, speaking in favor of the 1866 Civil Rights Bill explained:

> Mr. Speaker, I think I may safely affirm that this bill, so far as it declares the equality of all citizens in the enjoyment of civil rights and immunities, merely affirms existing law. We are following the Constitution. We are reducing to statute form the spirit of the Constitution. We are establishing no new right, declaring no new principle. It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen. Cong. Globe, 39th Cong. 1st Sess. 1117.

Section 1 of the Fourteenth Amendment, according to Congressman Bingham who drafted it, was not to create new substantive rights at the expense of the states.

> [T]his amendment takes from no State any right that ever pertained to it. No State ever had the right, under forms of law or otherwise, to deny to any freed man the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy. Id. at 2542.

The problem to which these Amendments and related legislation were addressed was the unenforceability of these rights. As Congressman Bingham detailed, in support of the 1871 Civil Rights Act,

> The States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the *citizen had no remedy*. They denied trial by jury, and *he had no remedy*. They took property without compensation, and *he had no remedy*. They restricted the freedom of the press, and *he had no remedy*. They restricted the freedom of speech, and *he had no remedy*. They restricted the rights of conscience, and *he had no remedy*. They bought and sold men *who had no remedy*. Cong. Globe, 42nd Cong. 1st Sess. 85 App. (Emphasis added).

It was to create such a federal remedy for the aggrieved citizen—not for the Attorney General—that the Reconstruction Amendments, and Section 1983 in particular, were enacted. See *Monroe* v. *Pape*, 365 U.S. 167 (1961).

It would be particularly incongruous if the states were able to deny such a remedy by closing to such litigation,

by means of sovereign immunity or the Eleventh Amendment, both the federal and state courts. One of the discriminatory practices of particular concern to Congress after the Civil War was state legislation forbidding blacks to institute litigation or testify in state courts. *Monroe* v. *Pape*, 365 U.S. 167, 176-178 (1961); *ten Broek, Equal Under Law*, 187n, 191n, 192 (1965). This denial of justice was particularly opprobrious when the basic rights were involved. As Bingham urged even before the Civil War regarding the privileges and immunities clause,

> This guarantee of the Constitution of the United States is useless and a mockery, if it does not limit State sovereignty and restrain each and every state from closing its territory and its courts of justice against citizens of the United States. *ten Broek, Equal Under Law*. 333-34 (1965).

Proponents of the Amendments rejected the suggestion that, because of considerations of federalism, federal "courts must be closed to the appeal of our citizens." Cong. Globe, 39th Cong. 1st Sess. 1924 (Remarks of Congressman Shellabarger). That the states should be able to close the federal or state courts to civil rights litigation is particularly inappropriate since, in most cases, the states have long ago opened their courts to litigation against themselves arising out of loans or other commercial activities.

The manifest desire of Congress, in framing the Reconstruction Amendments and Section 1983, was to exercise all its power to create an effective remedy[21] and to withdraw from the states any power to defeat or prevent enforcement of certain basic rights. Congressman Bingham denied that the states had the right to deny constitutional rights

[21] Subject to certain express limitations not applicable here. See *Monroe* v. *Pape*, 365 U.S. 167 (1961).

"under any pretext whatever." Cong. Globe, 39th Cong. 1st Sess. 1088. Congressman Lawrence declared

> There are certain absolute rights which pertain to every citizen, which are inherent, and of which a state cannot constitutionally deprive him. But not only are those rights inherent and indestructible, but the *means* whereby they may be possessed and enjoyed are equally so. Id. at 1833 (Emphasis added).

The plethora of unprecedented legislation in the decade after the Civil War is ample evidence of the willingness of the Congress, in the words of one Senate critic, "to overturn the whole Constitution in order to get at a remedy for these people." Id. at 499 (Remarks of Senator Cowan). By the time Section 1983 was enacted, the dispute within Congress was no longer over what type of judicial remedy to afford. Liberals and conservatives agreed that vindication of constitutional rights should be sought first from the federal judiciary, where the complainant was to be afforded "all the power of its courts." See Cong. Globe, 42nd Cong. 1st Sess. 578 (Remarks of Senator Trumbull), 609 (Remarks of Senator Pool). The debate centered over what further remedies, such as martial law, Congress should provide if all the powers which could be conferred upon the courts were exhausted and found wanting. Congress can hardly have intended to deny the federal courts the authority, when needed, to entertain suits against the states, for such a limitation would have increased the need for resort to drastic extrajudicial measures which northerners and southerners alike wished to avoid.

Under these circumstances the existence of a sovereign immunity defense in litigation under the Reconstruction Amendments is entirely incompatible with the rights protected by those Amendments. The policies and assumptions

of fact which underlie sovereign immunity are precisely the policies and assumptions repeatedly rejected by Congress in the decade following the Civil War. The existence of such a defense will invariably lead to situations in which no remedy exists for a violation of the rights secured by the Thirteenth, Fourteenth and Fifteenth Amendments, a totally impermissible result since those Amendments and Section 1983 were enacted for the express purpose of assuring that persons whose rights were violated would no longer lack an effective remedy.

D. By ratifying the Reconstruction Amendments the States consented to be sued for violations thereof.

Inasmuch as the post-Civil War Amendments were, by their nature, inconsistent with the existence of a sovereign immunity defense, the states by ratifying those amendments waived their general right not to be sued by a private citizen. Even without this inconsistency the ratification of those amendments would entail the same waiver, because the new constitutional provisions established new enforceable federal rights.

The nature of any knowing intelligent waivers by the states during the ratification years, from 1865 to 1870, depends upon the understanding which existed at that time as to the consequences of enacting the three Amendments. The adoption of the Eleventh Amendment did not answer all the questions posed by *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793). In *Chisholm* three of the five members of the Court agreed that the states were generally protected by sovereign immunity, but Justices Cushing and Blair held the immunity had been waived by the provision in Article III establishing federal jurisdiction over suits between a state and a citizen of another state. See 2 U.S. at 452, 468. The Eleventh Amendment withdrew federal juris-

diction over such suits, but said nothing about the existence of sovereign immunity under other circumstances. Unresolved by that Amendment, in particular, was whether the states might also have waived their sovereign immunity by authorizing, elsewhere in Article III, federal jurisdiction over cases arising under the Constitution and laws of the United States.

That question received a definite answer in *Cohens* v. *Virginia,* 19 U.S. 264 (1821). In *Cohens* a criminal defendant sought to appeal from a state court to this Court on the ground that his conviction violated the constitution. The state of Virginia maintained that its sovereign immunity precluded such an appeal since it had not consented to the exercise of federal jurisdiction over itself. See 5 L.Ed. at 266-268. This Court, in an opinion written by Chief Justice Marshall, unanimously rejected the state's contention on the ground that, in ratifying Article III, Virginia had consented to federal jurisdiction over questions arising under the constitution and laws of the United States.[22]

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[22] "With the ample powers confided to this supreme government, for these interesting purposes, are connected many express and important limitations on the sovereignty of the states, which are made for the same purposes. The powers of the Union, on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the states; but in addition to these, the sovereignty of the states is surrendered in many instances where the surrender can only operate to the benefit of the people and where, perhaps no other power is conferred on Congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a state may be a party. When we consider the situation of the

See also *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Peters) 657, 720 (1833).[23]

This conclusion in *Cohens* was recognized at the time as of great import to the vitality of sovereign immunity and the nature of federalism. In Virginia the legislature narrowly defeated a set of resolutions calling for constitutional amendments. *Jacobs, The Eleventh Amendment and Sovereign Immunity* 91 (1972). Both Thomas Jefferson and James Madison objected to the court's conclusion that a state might lack sovereign immunity in suits brought by its own citizens though such actions by citizen of other states were barred by the Eleventh Amendment. Id. at 92. Despite these criticisms, no constitutional amendments were seriously considered, and *Cohens* remained the law, unmodified, from Chief Justice Marshall's decision in 1821 until at least 1890.[24]

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government of the Union and of a state, in relation to each other; the nature of our Constitution; the subordination of the state governments to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States is confided to the judicial department, are we at liberty to insert in this general grant, an exception of those cases in which a state may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case." 2 U.S. at 393-394.

[23] Although under *Cohens* the judicial power extended to Federal question litigation against the states, it was not until 1875 that Congress conferred *nisi prius* jurisdiction over such cases on the Federal courts. See 28 U.S.C. §1331.

[24] In 1890 the Court, after considering *Cohens*, refused to apply Chief Justice Marshall's conclusions to an action to collect a debt owed by Louisiana on the ostensible ground that the state had impaired the obligation of contracts. *Hans* v. *Louisiana*, 134 U.S. 1, 18-21 (1890). With regard to constitutional provisions which are not self-executing, this Court has recently concluded that a state's waiver merely confers on Congress the power to subject the

The legislators who enacted the post-Civil War Amendments and civil rights legislation were well aware of *Cohens*, as might be expected. Congressman Bingham, the author of the first section of the Fourteenth Amendment, cited *Cohens* as proof of the federal power to protect indivdual rights against claims that this would infringe state sovereignty. Cong. Globe, 42nd Cong. 1st Sess. 81-82 App. Opponents of this legislation made reference to Justice Marshall's statement that the states were sovereign, urging that such sovereignty was inconsistent with the proposed federal role in protecting freedmen and others. See e.g. Cong. Globe, 39th Cong. 1st Sess. 1156 (Remarks of Congressman Miller). In the face of *Cohens*, such opponents conceded that even the contract clause was enforceable against the states. Cong. Globe, 42nd Cong. 1st Sess. 577 (Remarks of Senator Trumbull). Indeed, this Court in *The Civil Rights Cases* seemed to have believed that federal question jurisdiction included jurisdiction to hear actions against a state to enforce the contract clause. 109 U.S. 7, 12 (1883).[25]

There can be no doubt that the states understood that, under *Cohens*, every creation of a new federal constitu-

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state to federal jurisdiction, and separate inquiry must be made in each case as to whether Congress elected to exercise the power conferred on it by the states. *Employees* v. *Missouri Public Health Department*, 411 U.S. 279, 286-7 (1973). The continued vitality of *Cohens* in the case of self-executing constitutional provisions other than the contract clause is not clear.

[25] "Probably Congress had power to pass a law giving to the courts of the United States direct jurisdiction over contracts alleged to be impaired by a state law; and under the broad provisions of the Act of March 3, 1875, giving to the circuit courts jurisdiction of all cases arising under the Constitution and laws of the United States, it is possible that such jurisdiction now exists." When presented squarely with that question seven years later, the Court concluded that no such jurisdiction existed. *Hans* v. *Louisiana*, 134 U.S.1 (1890).

tional right brought with it a *pro tanto* waiver of sovereign immunity. Opposition among the states to the Fourteenth Amendment, for example, was centered less on the new powers of Congress under Section 5 than the expanded powers of the federal judiciary under Section 1. See generally, *Flack, The Adoption of the Fourteenth Amendment* (1908). The Amendment, it was said, would give the federal courts occasion to interfere in local affairs, concentrate the judicial power in the federal tribunals, enlarge federal jurisdiction to include every state law relating to life, liberty or property, and authorize the federal courts to hear every conceivable criminal and civil case, no matter how important or trivial. Id. at 150, 152, 166, 194-95. This widely expressed opposition to expanded federal jurisdiction, in the context of a constitutional amendment dealing primarily with state action, can only have been concerned with civil rights litigation which would be brought against the states themselves. See *The Civil Rights Cases,* 109 U.S. 7 (1883).

There is no reason to believe that the Congress which enacted the post-Civil War Amendments and the states which ratified them thought that actions against the states pursuant to *Cohens* would be limited to actions for injunctive relief. Historically, damages had been regarded as the ordinary remedy for invasion of individual rights. *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 397, 399 (1971). See, e.g., *Entick* v. *Carrington,* 19 Howell St., Tr. 1029 (1765). Injunctive relief, particularly affecting the conduct of government, has traditionally been regarded as "strong medicine" employed only when legal relief was inadequate. See *Perez* v. *Ledesma,* 401 U.S. 22, 111 (1971). (Brennan, J. concurring and dissenting.) The handful of cases filed against states in the Supreme Court prior to the ratification of the Eleventh Amendment were

not limited to monetary claims; *Moultrie* v. *Georgia*, for example, sought only a decree confirming the title to certain disputed land. *Jacobs, The Eleventh Amendment and Sovereign Immunity* 63-64 (1972).

The States, in ratifying the creation of new constitutional rights by the Thirteenth, Fourteenth and Fifteenth Amendments, simultaneously waived the Eleventh Amendment and the defense of sovereign immunity in any federal court empowered to hear questions arising under the Constitution of the United States. Within a few years Congress authorized the lower Federal courts to hear just such litigation, enacting in 1871 the predecessor to 42 U.S.C. §1983 and in 1875 the predecessor to 28 U.S.C. §1331. That prior consent would preclude assertion of sovereign immunity in a case under Section 1983 alleging a violation of the Fourteenth Amendment; it is no less applicable to a violation of congressional legislation implementing that Amendment. Since the instant case alleges a violation of both that Amendment and such implementing legislation, the state cannot defeat jurisdiction by claiming immunity.

E. An unwarranted expansion of the scope of sovereign immunity and the Eleventh Amendment would greatly weaken the constitutional guarantees contained in the Reconstruction Amendments.

In the preceding sections of this brief we have discussed at length reasons why the Eleventh Amendment should not be held to bar actions brought to enforce rights founded in the Thirteenth, Fourteenth, and Fifteenth Amendments. The question is not academic; it is one with which Amicus has been required to deal over a period of time in litigation brought to vindicate the rights of those the Reconstruction Amendments were intended to protect. A decision that casts doubt on the power of the federal courts to entertain such suits or to render effective relief in

them would have a devastating impact on the future of civil rights enforcement.

In the period from 1957 until 1965, an Eleventh Amendment defense to suits seeking to end unlawful racial discrimination was raised in numerous instances, occasioning the Court of Appeals for the Fifth Circuit to remark:

> "For the second time in the case and for the seventh time in recent years, we hold that a state agency is not immune from a suit to enjoin it from enforcing an unconstitutional statute. . . ." *McCoy* v. *Louisiana State Board of Education*, 345 F.2d 720, 721 (5th Cir. 1965).

See also, *School Board of Charlottesville* v. *Allen*, 240 F.2d 59 (4th Cir. 1956); *Orleans Parish School Board* v. *Bush*, 242 F.2d 156 (5th Cir. 1957); *Dorsey* v. *State Athletic Commission*, 168 F.Supp. 149 (E.D. La. 1958); *Board of Supervisors of Louisiana State U.* v. *Fleming*, 265 F.2d 736 (5th Cir. 1959); *Board of Trustees of Arkansas A.&M. College* v. *Davis*, 396 F.2d 730 (8th Cir. 1968).

The argument that private citizens could not enforce their constitutional rights in federal court because of sovereign immunity and the Eleventh Amendment seemed to have been finally laid to rest by this Court in its unanimous decision in *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218 (1964).

However, six months ago this Court issued its opinion in *Employees* v. *Department of Public Health and Welfare*, 411 U.S. 279 (1973), concerning the applicability of sovereign immunity and the Eleventh Amendment to federal legislation under the Commerce Clause. Since then state defendants have, with varying results, urged

that the rationale of *Employees* should be extended to bar enforcement against the states of the post-Civil War Amendments.

For example, the constitutionality of awards of back pay in Title VII litigation against the states has been challenged in three related cases, *Dillenberger* v. *Florida Probation and Parole Commission*, Civ. No. 73-66 (N.D. Fla., Tallahassee Div.); *Wainwright* v. *State of Florida Department of Transportation*, Civ. No. 73-42 (N.D. Fla. Mariana Div.); *Graham* v. *Marshall*, Civ. T-73-77 (N.D. Fla., Tallahassee Div.).[24] State officials have successfully urged that sovereign immunity and the Eleventh Amendment, as construed by *Employees*, protect them from even personal liability for intentionally failing to provide treatment to Negro males suffering from syphilis. *Pollard* v. *United States*, Civil Action No. 4126-N (M.D. Ala.) (Order dated September 18, 1973). In *Richardson* v. *State Board of Law Examiners*, the defendants have asserted without success that *Employees* prohibited litigation to prevent discrimination against Negro applicants for the bar (Civil Action No. 72-1219, D.S.C.).

A decision by this Court that the Eleventh Amendment bars the relief sought in the present case would therefore cast serious doubt on the constitutionality of federal courts granting analogous retrospective relief in cases under Title VII of the Civil Rights Act of 1964 as it now applies to state agencies. Moreover, it would raise questions as to the power of the federal courts to grant certain kinds of prospective injunctive relief that would have the effect of requiring the expenditure of state funds, *e.g.*, an order to

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[24] Even prior to *Employees*, at least one federal court had indicated, in *dictum*, that the Eleventh Amendment barred suit against a state agency for employment discrimination under 42 U.S.C. §§1981 and 1983. *Bennett* v. *Gravelle*, 323 F. Supp. 203 (D. Md. 1971).

hire a black job applicant who has been denied a position because of his race. Such restrictions on the power of Congress and the courts to enforce the Reconstruction Amendments would be wholly inconsistent with decisions of this Court since 1954 and can be avoided by a holding that, where a conflict is unavoidable, those Amendments restrict the reach of the Eleventh.

CONCLUSION

At the end of the eighteenth century, proponents of sovereign immunity urged its erection as a solid wall insulating the states in all cases from judicial control and enforceable civil liability. That uniform opposition by the states to being sued in state or federal courts has long since passed. At the time of *Chisholm* v. *Georgia* it was large businessmen and lenders trying to collect substantial debts who sought jurisdiction over the states. Since 1800, however, the growing political and economic influence of this class of plaintiffs has won for them, in Congress and the state legislatures, the right to litigate their claims against the states and the federal government. State agencies wishing to do business with private firms must, in general, agree to provide them with some avenue of judicial relief. The legislation establishing agencies to raise substantial sums by the sale of state notes and bonds invariably contains a provision authorizing the agency to sue and be sued. When a large firm finds its contractual arrangement with a state or the Federal government no longer profitable and the contract itself does not contain a remedy, the firm is usually able, by virtue of its unusual degree of influence over public officials, to persuade the government to waive its contractual rights or assist the firm with loans or outright

gifts. For a large bank, building contractor, or aircraft manufacturer, the defense of sovereign immunity has been effectively abolished. But a private citizen, aggrieved by state misconduct far more serious under our constitutional system, has no such political or economic power; for him sovereign immunity is still used to preclude the sort of relief readily dispensed to others.

Under these circumstances the assertions of a defense of sovereign immunity resembles, not firm adherence to some uniformly applied principle, but the selective erection of a procedural barrier to the vindication of the constitutional rights of the weak and unpopular. Whether a state has a legitimate interest in the creation of such an obstacle is a federal question of no small difficulty. See *Henry* v. *Mississippi*, 379 U.S. 443, 447-49 (1965). Certainly in a case such as this that question poses serious problems of equal protection.

For these reasons, the Amicus urges that the judgment of the Seventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

JACK GREENBERG
CHARLES STEPHEN RALSTON
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

Attorneys for Amicus Curiae

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

No. 72-1410

JOEL EDELMAN, DIRECTOR OF ILLINOIS DEPARTMENT OF PUBLIC AID, *et al.*,
Petitioners,

v.

JOHN JORDAN, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

SHELDON ROODMAN
Legal Assistance Foundation
of Chicago
64 East Jackson Boulevard
Chicago, Illinois 60604
Telephone: (312) 922-5625
Attorney for Respondents

Of Counsel:
Marilyn Kaplan Katz

Washington, D.C. • CLB PUBLISHERS, INC. • (202) 393-0625

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED	2
QUESTIONS PRESENTED	5
STATEMENT OF THE CASE	6
SUMMARY OF ARGUMENT	11
ARGUMENT:	
I. IN A SUIT AGAINST A STATE WELFARE DIRECTOR IN WHICH A FEDERAL COURT HAS UNDISPUTED JURISDICTION, THE ELEVENTH AMENDMENT DOES NOT STRIP THE COURT OF JURISDICTION TO GRANT COMPLETE EQUITABLE RELIEF, INCLUDING EQUITABLE RESTITUTION, TO REDRESS VIOLATIONS OF FEDERAL LAW	13
A. This Court Has Affirmed, in the Face of Eleventh Amendment Defenses, Numerous Judgments Ordering State Officials To Make Equitable Restitution of Public Assistance Benefits Wrongfully Withheld From Public Aid Recipients	15
B. Under the Doctrine of *Ex Parte Young*, a State Official Acting in Contravention of Paramount Federal Law Is Stripped of His Official or Representative Capacity and Is Not Protected by Eleventh Amendment State Immunity	19
C. The Eleventh Amendment Has Never Been Interpreted by This Court as Restricting the Judicial Power of a Federal Court With Respect to the Granting of Appropriate Equitable Relief in a Suit Over Which It Has Undisputed Jurisdiction	24

Page

D. Equitable Relief Which Has an Impact on the State Treasury Is Not Barred by the Eleventh Amendment 29

II. ASSUMING, ARGUENDO, THAT THIS IS A SUIT AGAINST THE STATE, ILLINOIS HAS CONSENTED TO THIS SUIT IN FEDERAL COURT 34

A. Illinois Has Consented to This Suit in Federal Court by Its Action in Defending the Suit and Its Failure To Raise the Absence of Consent and the Eleventh Amendment Defense in a Timely Manner Before the Trial Court 34

1. Eleventh Amendment Immunity Is in the Nature of a Privilege of Personal Jurisdiction Which Is Deemed Waived by the Failure To Raise It in a Timely Fashion 36

2. Unique Aspects of Eleventh Amendment Immunity Reinforce the General Rule on Waiver of Such a Privilege by Failure To Raise It in the Trial Court 38

B. Illinois Constructively Consented to Suit by Voluntarily Choosing To Participate in the Federal AABD Program and Receiving Federal Funds Thereunder 40

III. THE TIME STANDARDS FOR PROCESSING AABD APPLICATIONS EMBODIED IN HEW REGULATIONS ARE NEITHER AN UNREASONABLE INTERPRETATION OF, NOR INCONSISTENT WITH, THE "REASONABLE PROMPTNESS" REQUIREMENT OF THE SOCIAL SECURITY ACT 45

A. The Defense of Prospective Application Only of District Court's Judgment Is Without Merit 48

Page

IV. GRANTING EQUITABLE RESTITUTION TO MEMBERS OF THE PLAINTIFF CLASS WAS WITHIN THE EQUITABLE POWERS OF THE COURT 51

A. The Trial Court in the Exercise of Its Traditional Equitable Powers and in Furtherance of the Purposes of the Social Security Act Had the Authority To Require Restitution of AABD Benefits Wrongfully Denied 52

B. Granting Equitable Restitution to Members of the Plaintiff Class Was Appropriate and Necessary To "Redress" the Deprivation of Federal Rights Pursuant to the Congressional Mandate in Section 1983 58

C. The Remedy of Equitable Restitution Is Necessary To Effectuate Compliance With the Social Security Act 60

D. The Seventh Circuit Did Not Err in Upholding the Decree Requiring Equitable Restitution to Members of the Plaintiff Class Under the Circumstances of This Case 66

TABLE OF AUTHORITIES

Cases:

Aerojet General Corp. v. Askew, 453 F.2d 819 (5th Cir. 1971), *petition for rehearing denied*, 453 F.2d 836 (1972) 23

Alexander v. Weaver, 345 F. Supp. 666 (N.D. Ill. 1972) 17, 49, 50, 63

Alvarado v. Schmidt, 317 F. Supp. 1027 (W.D. Wis. 1970) 17, 63

Baker v. Carr, 369 U.S. 186 (1962) 32

Baxter v. Birkins, 331 F. Supp. 222 (D. Colo. 1970) 17

Page

Brooks v. Yeatman, 311 F. Supp. 364 (M.D. Tenn. 1970) 17

Chesapeake Bay Bridge and Tunnel District v. Lauritzen, 404 F.2d 1001 (4th Cir. 1968) 41

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 48, 51

Chicago Welfare Rights Org. v. Weaver, ___Ill.2d ____ (Sept. 25, 1973), *aff'g on other grounds*, 5 Ill. App.3d 655 (1972) 23

Chisholm v. Georgia, 2 Dall. 419, 1 L.Ed. 440 (1793) 24

City of Kenosha v. State, 151 N.W.2d 36, 35 Wis.2d 317 (1967) 37

Clark v. Barnard, 108 U.S. 436 (1883) 35, 37

Cook v. Davis, 178 F.2d 595 (5th Cir. 1949), *cert. denied*, 340 U.S. 811 (1950) 33

County of Cook v. Ogilvie, 40 Ill.2d 379, 280 N.E.2d 224 (1972) 23, 39

Doe v. Swank, 332 F. Supp. 61 (N.D. Ill. 1971), *aff'd sub nom.*, Weaver v. Doe, 404 U.S. 987 (1971) .. 18, 64, 67

Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279 (1973) 13, 36, 40, 43, 44

Ex Parte Young, 209 U.S. 123 (1908) 13

Ford Motor Co. v. Department of Treasury of State of Indiana, 323 U.S. 459 (1945) 29, 30, 31, 38, 39

Frye v. Lukehard, 361 F. Supp. 60 (W.D. Va. 1973) ... 18, 63

Gaddis v. Wyman, 304 F. Supp. 717 (S.D. N.Y. 1968) (order at par. 10,506, Transfer Binder, CCH Pov. L. Rptr.), *aff'd per curiam sub nom.*, Wyman v. Bowens, 397 U.S. 49 (1969) 16, 67

Gaither v. Sterrett, 346 F. Supp. 1095 (N.D. Ind. 1972), *aff'd*, 93 S.Ct. 688 (1973) 18

Georgia Railroad & Banking Co. v. Redwine, 342 U.S. 299 (1952) 25, 38

Goldberg v. Kelly, 397 U.S. 254 (1970) 32, 52, 70

Graham v. Richardson, 403 U.S. 365 (1971) 17, 32

Page

Great Northern Insurance Co. v. Read, 322 U.S. 47 (1944) 29, 38

Griffin v. School Board of Prince Edward County, 377 U.S. 218 (1964) 25, 32

Grubb v. Sterrett, 400 U.S. 922 (1971) *aff'g* 315 F. Supp. 990 (N.D. Ind. 1970) 18

Gunter v. Atlantic Coastline R.R. Co., 200 U.S. 273 (1905) 37

Hagood v. Southern, 117 U.S. 52 (1886) 25

Hans v. Louisiana, 134 U.S. 1 (1890) 22

Hodgson v. Taylor, 439 F.2d 288 (8th Cir. 1971) 62

Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971) 33

Humphrey v. Pegues, 83 U.S. (16 Wall.) 244 (1872) 37

Illinois Central R.R. Co. v. Adams, 180 U.S. 28 (1901) 40

J.I. Case v. Borak, 377 U.S. 426 (1963) 52

Jackson v. Ogilvie, 426 F.2d 1333 (7th Cir. 1970) *cert. denied*, 400 U.S. 833 (1970) 32

Jefferson v. Hackney, 406 U.S. 535 (1972) 45

Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio, 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) 33

Jordan v. Weaver, 472 F.2d 985 (7th Cir. 1973), *cert. granted sub nom* Edelman v. Jordan, 93 S.Ct. 2776 (1973) ..... *passim*

Kennecott Copper Corp. v. State Tax Commission, 327 U.S. 573 (1946) 29

King v. Smith, 392 U.S. 309 (1968) 41, 60

LaRaza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972) 32

Page

Lawson v. Brown, 349 F. Supp. 203 (W.D. Va. 1972) 63

Lemon v. Kurtzman, 403 U.S. 602 (1971) 50, 51

Lemon v. Kurtzman, 411 U.S. 192 (1973) 50, 51

Lewis v. Martin, 397 U.S. 552 (1970) 48

Lewis v. Riggins (N.D. Ind. 1971) (71 H 19) (attached to Plaintiff's Reply Brief, item 56) 17, 47

Lidie v. State of California, 478 F.2d 552 (9th Cir. 1973) 37

Like v. Carter, 448 F.2d 798 (8th Cir. 1971), *cert. denied*, 405 U.S. 1045 (1972) 47

Louisiana v. Jumel, 107 U.S. 711 (1883) 25

Louisiana State Bd. of Educ. v. Baker, 339 F.2d 911 (5th Cir. 1964) 22

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) 29, 30, 59

McDonald v. Dept. of Public Welfare, 430 F.2d 1268 (5th Cir. 1970) 17

Machado v. Hackney, 299 F. Supp. 644 (W.D. Tex. 1969) 17

Meyers v. Juras, 327 F. Supp. 759 (D. Or. 1971), aff'd 404 U.S. 803 (1971), *rehearing denied* 404 U.S. 961 (1971) 64

Missouri v. Fiske, 290 U.S. 18 (1933) 35, 36

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Mitchum v. Foster, 407 U.S. 225 (1972) 29, 58

Monroe v. Collins, 66 N.E.2d 670, 393 Ill. 553 (1946) 38

Monroe v. Pape, 365 U.S. 167 (1961) 59

North Carolina v. Temple, 134 U.S. 22 (1890) 25

Ojeda v. Hackney, 319 F. Supp. 149 (N.D. Tex. 1970 17

Page

Osborn v. Bank of the United States, 22 U.S. (9 Wheat) 738 (1824) 33

Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924) 36

Parden v. Terminal R.R. Co., 377 U.S. 184 (1954) 39, 40

Perez v. Ledesma, 401 U.S. 82 (1971) 31, 33

Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959) 35, 37, 39, 40

Porter v. Warner Holding Co., 328 U.S. 395 (1946) .... *passim*

Prout v. Starr, 188 U.S. 537 (1903) 29

Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969) 48

Rodriguez v. Swank, 403 U.S. 901 (1971), *aff'g* 318 F. Supp. 289 (N.D. Ill. 1970) ..... *passim*

Rosado v. Wyman, 397 U.S. 397 (1970) ..... *passim*

Rosado v. Wyman, 322 F. Supp. 1173 (E.D. N.Y. 1970) 57

Rothstein v. Wyman, 303 F. Supp. 339 (S.D. N.Y. 1969), *vacated and remanded*, 398 U.S. 275 (1970) 67

Rothstein v. Wyman, 336 F. Supp. 382 (S.D. N.Y. ..... 1970) 67

Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972) *cert. den.*, 411 U.S. 921 (1973) 18, 30, 67

Samuel v. Univ. of Pittsburg, 56 F.R.D. 435 (W.D. Pa. 1972) 27, 62

Schaak v. Schmidt, 344 F. Supp. 99 (E.D. Wis. 1971) ... 17, 63

School Board of Charlottesville v. Allen, 240 F.2d 59 (4th Cir. 1956), *cert. denied* 353 U.S. 910 (1957) 32

Schultz v. Mistletoe Express Service, Inc., 434 F.2d 1267 (10th Cir. 1970) 69

Page

Schultz v. Parke, 413 F.2d 1364 (5th Cir. 1969) 69

Shapiro v. Thompson, 270 F. Supp. 331 (D. Conn. 1967) *aff'd*, 394 U.S. 618 (1969) 17

Silvey v. Roberts, ___ F. Supp. ___ (M.D. Fla., Aug. 3, 1973) 18

Sims v. Amos, 336 F. Supp. 924 (M.D. Ala. 1972) (Supplemented in 340 F. Supp. 691), *aff'd* 93 S.Ct. 290 (1972) 27, 32

State Dept. of Health and Rehabilitative Services v. Zarate, 407 U.S. 918 (1972) *aff'g* 347 F. Supp. 1004 (S.D. Fla. 1971) 15, 57, 67

Sterling v. Constantin, 287 U.S. 378 (1932) 21, 26

Sterrett v. Mothers and Childrens Rights Organization, 409 U.S. 809 (1972), *aff'g unreported order and judgment* (N.D. Ind. 1972), (CCH Pov. Law Rptr., Vol. 2, par. 15,384), *on remand from* Carpenter v. Sterrett, 405 U.S. 971 (1971) 16, 57, 67

Stoddard v. Fisher, 330 F. Supp. 566 (D. Me. 1971) ... 17

Story v. Roberts, 352 F. Supp. 473 (M.D. Fla. 1972).... 18, 64

Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) ... 52

Swann v. Charlotte Mecklenberg Board of Education, 402 U.S. 1 (1971) 53

Taylor v. Martin, 330 F. Supp. 85 (N.D. Cal. 1971), *aff'd*, 404 U.S. 980 (1971) 64

Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268 (1969) 47

Townsend v. Swank, 404 U.S. 282 (1971) 42

Triplett v. Cobb, 331 F. Supp. 652 (N.D. Miss. 1971) ... 17

Tyrrell v. District of Columbia, 243 U.S. 1 (1917) 45, 48

U.S. v. Donnelly, 397 U.S. 286 (1970) 50

Vlandis v. Kline, 409 U.S. 1036 (1973), *aff'g* 346 F. Supp. 526 (D. Conn. 1972) 28, 32

Page

Wesberry v. Sanders, 376 U.S. 1 (1964) 27, 32

Wilson v. Weaver, 358 F. Supp. 1147 (N.D. Ill. 1973) 17

Wirtz v. Malthor, Inc., 391 F.2d 1 (9th Cir. 1968) 62, 69

Wirtz v. Wershow Co., 416 F.2d 1071 (9th Cir. 1969) 62

Worrell v. Sterrett, para 10,575, C.C.H. Pov. Law Rptr. transfer binder (N.D. Ind. 1969) 47

Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972) 33

United States Constitution and Statutes:

United States Constitution:

Amendment XI 13-38
Amendment XIV 29

Civil Rights Acts of 1871:

42 U.S.C. §1983 ..... 29, 52, 58

Social Security Act, as amended:

42 U.S.C. §1302 (1969 ed.) 2, 46, 47
42 U.S.C. §§1381-1385 (1969 ed.) 6, 41, 55
42 U.S.C. §1382(a) (1969 ed.) 2, 45, 47
42 U.S.C. §1381 et. seq. (Supp. 1973) 6

Title 28, U.S.C. §1343(3) 59

Federal Regulations:

45 C.F.R. §205.10(b)(2)(3) 42
45 C.F.R. §206.10(a)(3) 3, 6, 46

Dept. of Health, Education and Welfare, Handbook of Public Assistance:

Part IV, §2200(b)(3) 3, 4, 6, 46
§2300(b)(5) 4, 6, 46

Part IV – A, §2331, Item 1 (attached as Exhibit A) 47

Page

State Statutes:

Ill. Rev. Stat., Ch. 110, §264 et seq. 23

State Regulations:

Illinois Categorical Assistance Manual,
Ill. Dept. of Public Aid
§4004.1 47
§§8255 and 8255.1 ..... 4, 8, 9

Miscellaneous:

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Butz v. Carter (No. 73-546, Petition for certiorari of the United States) 41, 61

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

No. 72-1410

JOEL EDELMAN, DIRECTOR OF ILLINOIS DEPARTMENT OF PUBLIC AID, *et al.*,

Petitioners,

v.

JOHN JORDAN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion (App. 117-120) and judgment (App. 122-128) of the District Court are unreported. The opinion of the Court of Appeals for the Seventh Circuit is reported at 472 F.2d 985 (7th Cir. 1973), and is in the appendix to the Petition.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Statutory Provisions[1]

Section 1182 (a)(5)(8) and (13) of the Social Security Act, 42 U.S.C.A. §1382(a)(5)(8) and (13) (1969 ed.)

"(a) A State plan for aid to the aged, blind, or disabled and medical assistance for the aged, must–

* * *

(5) Provide (A) such methods of administration . . . as are found by the Secretary to be necessary for the proper and efficient operation of the plan.

* * *

(8) Provide that all individuals wishing to make application for aid or assistance under the plan shall have opportunity to do so, and that such aid or assistance shall be furnished with reasonable promptness to all eligible individuals,

* * *

(13) Include reasonable standards, consistent with the objectives of this subchapter for determining eligibility and the extent of aid or assistance under the plan."

Section 1102 of the Social Security Act, as amended, 42 U.S.C. §1302

"The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health, Education and Welfare, respectively, shall make and publish such rules and regulations, not inconsistent with this

[1] In the Brief for Petitioner (hereinafter "Pet. Br.") at pp. 2-3, 42 U.S.C. §604 is set forth. That section relates to the AFDC program which is not at issue in this case.

chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter."

Federal Regulations

45 C.F.R. §206.10(a)(3)[2]

"§206.10 *Application, determination of eligibility and furnishing of assistance.*

"(a) *State plan requirements.* A State plan under Title I, IV-A, X, XIV, XVI, or XIX of the Social Security Act must provide that:

* * *

"(3) A decision will be made promptly on applications, pursuant to reasonable State-established time standards, not in excess of 30 days for OAA, AFDC, and AB (and in AABD and MA as to the aged and blind) and 60 days in APTD (and in AABD and MA as to the disabled). Under this requirement, the applicant is informed of the agency's time standard in acting on applications, which covers the time from date of application to the date that the assistance check, or notification of denial of assistance or change of award, or the eligibility decision with respect to medical assistance, is mailed to the applicant or recipient. . . ."

Department of Health, Education and Welfare, Handbook of Public Assistance Administration, Part IV, Sections 2200 and 2300

"2200. Requirements for State Plans.

"A State Plan for OAA, AFDC, AB, APTD, or AABD must provide that:

* * *

[2] Effective Oct. 15, 1973, the federal time standards in processing aged and blind applications will be 45 days. 38 Fed. Reg. 22009 (Aug. 15, 1973).

"(b)(3) Prompt action will be taken on each application, within reasonable State-established time standards (which, effective July 1, 1968, will not exceed 30 days in AFDC, OAA, and AB, and as to aged and blind in AABD, and 60 days in APTD and as to disabled in AABD).

"2300.

"(b)(5) Applicants are informed of the agency's time standard for promptness in acting on applications (see IV-2200(b)(3)) which is specified in agency policy, and that it covers the time from the date of application to the date the applicants are determined eligible and receive their first assistance check or notice of denial of assistance, and of their right to request a hearing before the State agency if the standard is not met regarding their applications."

State Regulations

Illinois Categorical Assistance Manual, Illinois Department of Public Aid

"8255. *Initial Awards*

"Initial awards may be new grants, reinstatements, or certain types of resumptions. They can be effective for the month in which Form FO-550 is signed but for no prior period except under the conditions described in Manual topics 8256.2 and 8256.3.

"8255.1. *New Grants*

"A new grant is the first grant authorized after an application has been accepted in a case which has not previously received assistance under the same assistance program. It may be authorized for the month in which Form FO-550 is signed but not for any prior period unless it meets the exceptions enumerated in Manual Topic 8256.3.

"4004.1[3]

"Except for DA and MA-NG(D) cases which have a time standard of 45 days, the time standard for disposition of applications is 30 days from the date of application to the date the applicants are determined eligible and the effective date of their first assistance or are determined ineligible and receive a notice of denial of assistance . . . ."

QUESTIONS PRESENTED

1. In a suit against a state public aid official does the Eleventh Amendment, which does not deprive the federal court of the power to enjoin the state official from enforcing an illegal state regulation and the power to require the state official to comply in the future with federal law, nevertheless, deprive the federal court of the power to grant equitable restitution as part of the appropriate equitable relief in the case?

2. If this is a suit against the State of Illinois, has Illinois consented to this suit in federal court (a) by defending the action in the trial court and not contesting in a timely manner the jurisdiction of the court, and (b) by voluntarily choosing to participate in the AABD program, and receiving federal funds therefor?

3. Did the trial court in the exercise of its traditional equitable powers and in furtherance of the purposes of the Social Security Act, have the authority to require equitable restitution of AABD benefits wrongfully denied?

4. Did the Seventh Circuit err as a matter of law in upholding the restitution provisions of the judgment of the trial court?

[3] This section is misquoted in *Jordan v. Weaver*, 472 F.2d at 987 n.2.

STATEMENT OF THE CASE

This case was brought by John Jordan, a needy disabled person, on behalf of a class of needy aged, blind, and disabled persons, whose applications for Aid to the Aged, Blind or Disabled (hereinafter "AABD") were delayed in processing, and who were denied AABD benefits to which they were entitled in contravention of federal requirements under the AABD program. Illinois voluntarily chose to participate in the AABD program under the Social Security Act, 42 U.S.C. §1381-1385 (1969 ed.),[4] and in so doing, Illinois admittedly agreed to comply with the provisions of the Social Security Act and regulations thereunder. (App. 42, 59, par. 18)

Specifically, mandatory federal regulations, issued in February, 1968, to become effective July 1, 1968, prescribed maximum permissible time standards for processing AABD applications. (R. Item 13, and Exhibit A, attached to Item 39, Handbook Transmittal No. 139, Department of Health, Education and Welfare, Handbook of Public Assistance Administration, Part IV, Sections 2200 (b)(3) and 2300(b)(5)). The regulations required that eligibility determinations had to be made within 30 days for the aged and blind, and 60 days for the disabled. In addition, for those found eligible, assistance had to be received by the eligible person within the time periods.[5] As a necessary corollary, for those eligible persons whose applications were delayed in processing beyond the time

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[4] Effective January 1, 1974, the AABD program is being replaced, 42 U.S.C. §1381 *et seq.* (Supp. 1973).

[5] The regulations were amended to require mailing instead of receipt within the time periods. 45 C.F.R. 206.10(a)(3) (eff. Feb. 27, 1971).

periods through no fault of the applicant, the regulations required assistance when approved, to be effective as of the last day of the time period in which the application should have been acted upon.

The defendant, Harold O. Swank, then Director of the Illinois Department of Public Aid, knew that these regulations were mandatory and binding on the State, and that they were effective July 1, 1968. (App. 85, 89) He also knew that these federal requirements were subsequently not complied with in Illinois and that substantial numbers of needy aged, blind, and disabled persons in the numerous counties of the State of Illinois did not have their applications processed within the maximum time periods permissible under federal law. (App. 86, 87, 89)

More importantly, he was fully aware that substantial numbers of *eligible* aged, blind, and disabled persons whose applications were not processed within the maximum permissible time periods but were subsequently approved, were being deprived of AABD assistance to which they were entitled under federal law, as a result of the department regulations (Sections 8255 and 8255.1, Illinois Categorical Assistance Manual, Illinois Department of Public Aid) which prohibited the authorization of AABD assistance for any period prior to the month in which an application was approved.[6] (App. 85-89) For example, the application of the named plaintiff, John Jordan, a mentally retarded sixty-one year old, was pending almost four months, and was finally acted upon and approved in January 1971 only after the court

[6]The net effect of these Illinois regulations was to create a financial disincentive to the prompt processing of applications. For every month that an application was delayed, the department saved the expenditure of the monthly entitlement of the eligible recipient.

required such action. (App. 36) Even then, based upon Sections 8255 and 8255.1, he was granted assistance effective only as of January 1, 1971, the month in which his application was approved, and was denied AABD assistance for the months of November and December, 1970, which he should have received in accordance with the federal requirements that the effective date of assistance was the last day on which his application should have been acted upon. His case is typical of thousands of other AABD applicants.

Significantly, the unlawful delay in processing of John Jordan's application and the unlawful denial of AABD benefits to which he was entitled, came after the entry of the judgment in *Rodriguez v. Swank*, 318 F. Supp. 289 (N.D. Ill. 1970) (judgment entered Oct. 29, 1970) (App. 22-29). In that case involving a class of AFDC applicants, a three-judge court had already ruled that (1) the federal regulations prescribing maximum time periods for processing applications were mandatory and binding and future compliance therewith was required, (2) assistance had to be effective as of the last day of the maximum time period for processing applications when the application was not approved within the permissible time period, (3) the state regulations (Sections 8255 and 8255.1) barring assistance for any period prior to the month in which the application was approved were "null and void," and (4) members of the class were entitled to restitution of benefits wrongfully withheld. Notwithstanding this judgment, the state welfare director, insofar as AABD applicants were concerned, continued to treat the same federal regulations as merely advisory, did not comply therewith (App. 30), did not require that assistance be effective as of the last day of the maximum time period for processing the application when there was a delay in processing beyond the requisite time period, and

continued to apply in cases involving AABD applicants the state regulations which had been declared null and void.

To remedy this defiance of federal law, John Jordan, individually and on behalf of all others similarly situated, filed the instant suit on January 12, 1971. In pertinent part, the complaint sought to enforce the federal time regulations for processing applications by enjoining the widespread failure to comply with them, sought to enjoin the enforcement of Sections 8255 and 8255.1 as applied to AABD applicants, and further sought to obtain all AABD benefits wrongfully withheld. (App. 5-16) Immediately, plaintiffs sought and secured a temporary restraining order requiring the defendants to comply with the mandatory federal time standards for processing all future AABD applications. (App. 17-21, 31-36)[7] Next, plaintiffs secured a preliminary injunction establishing that "the entitlement of all eligible AABD applicants in the State of Illinois shall attach no later than the thirtieth (30th) day after application as to aged and blind applicants, and no later than the sixtieth (60th) day after application as to disabled applicants" in cases where eligibility was determined subsequent to the maximum time period. (App. 78) Further, the court declared null and void the state regulations (including Section 8255) inconsistent with the terms of the preliminary injunction. (App. 79)

Subsequently, on plaintiffs' motion for summary judgment the court granted, *inter alia*, a permanent injunction requiring compliance with federal time standards and restitution of AABD benefits wrongfully denied AABD recipients from July 1, 1968, the effective date of

[7]Pages 35 and 36 of the Appendix are improperly transposed.

the federal regulations, to April 16, 1971,[8] the date on which the trial court had preliminarily enjoined the enforcement of the illegal state regulations barring assistance prior to the month in which a grant was initially approved. (App. 117-120) The Court rejected the defendants' contention that the release of payments wrongfully withheld should not go "back any further than the date this lawsuit was filed." (App. 107) Contrary to the repeated representations of petitioner (Pet. Br. at 4, 7, 8), plaintiffs never sought not obtained compensatory damages. (App. 122-128)

On appeal to the Seventh Circuit, the state welfare director, in challenging the restitution provisions, took a different position from that presented to the trial court prior to judgment. He argued that restitution of any illegally denied AABD benefits was improper for two reasons: (1) the Eleventh Amendment barred such relief and (2) the judgment of the court should be given prospective relief only. The Eleventh Amendment defense was raised notwithstanding the fact that at no time prior to the entry of the judgment of the district court (App. 122-128), or even prior to the filing of the notice of appeal, did the defendant challenge the jurisdiction of the trial court on Eleventh Amendment grounds. The Seventh Circuit rejected the Director's contentions and affirmed the restitution provisions of the lower court judgment. *Jordan v. Weaver*, 472 F.2d 985 (7th Cir. 1973).[9] This Court granted certiorari, *sub nom. Edelman*

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[8] There is a typographical error in the judgment where it reads on the top line April 16, 197"2". (App. 125) This error is carried forward by petitioner at the top of page 7 of their Brief.

[9] Other issues raised on the cross-appeal were rejected by the Seventh Circuit. These issues are not before this Court.

v. Jordan, 93 S.Ct. 2776 1973) and shortly thereafter, Mr. Justice Rehnquist denied the petitioner's application for a stay with respect to the prospective relief, but granted a stay of the provisions relating to restitution. *Edelman v. Jordan*,____U.S.____ (July 19, 1973).

SUMMARY OF ARGUMENT

This suit was brought on behalf of a class of needy aged, blind, and disabled persons against the Director of the Illinois Department of Public Aid to enjoin certain state practices and regulations which allegedly violated federal requirements for processing AABD applications, and to obtain equitable restitution of AABD benefits wrongfully denied incident to these unlawful practices. The Director concedes that under the doctrine of *Ex Parte Young* the federal court, notwithstanding the Eleventh Amendment, may enjoin the Director from enforcing the state regulations, and may also require the Director to comply with the federal time standards for processing of AABD applications in the future. Respondent AABD recipients maintain that the relief of equitable restitution, incident to the other equitable relief in the case, is similarly not barred by the Eleventh Amendment. Under the doctrine of *Ex Parte Young*, the Director is stripped in all respects of his official position when acting in violation of law, and, accordingly, the federal court may grant whatever equitable relief is appropriate under the circumstances. Moreover, the immunity of a state under the Eleventh Amendment is from a "suit" in federal court and not from certain types of equitable relief. The fact that equitable relief against a state official may have an impact upon the state treasury is not relevant to the question of the scope of state immunity from suit in federal court under the Eleventh Amendment.

Assuming, *arguendo*, that this is a suit against the State of Illinois, the state has consented to this suit in federal court by defending this action in the trial court without a timely challenge to the jurisdiction of the court. The accepted principle that a state may be sued with its consent must mean that it is necessary to raise the absence of consent in the trial court. Otherwise, consent will be assumed. In addition, if this is a suit against the State, Illinois, by its voluntary participation in the AABD program, and by receiving federal funds therefor, on the condition that it furnish AABD assistance to the needy in compliance with the federal requirements under the AABD program, has constructively consented to suits in federal court to effectuate compliance with the federal requirements. In enacting the AABD program, Congress intended to have federal questions relating to the administration of the AABD program decided in federal court, and thus conditioned state participation in the AABD program on waiver of state immunity.

Finally, it is clear that the trial court, in the exercise of its traditional equitable powers, and acting pursuant to Section 1983, had the authority to require restitution of AABD benefits wrongfully denied. In this case, the Seventh Circuit did not err in upholding the restitution provisions of the lower court decree. They were necessary and appropriate to effectuate compliance with federal requirements under the Social Security Act, and to deter future violations thereof. In addition, there were no valid equities or reasons why members of the plaintiff class who were denied AABD benefits to which they were entitled, should not receive restitution of said benefits. Receipt of these benefits at this time furthers the paramount congressional interest of providing financial assistance to needy aged, blind, and disabled persons.

ARGUMENT

I.

IN A SUIT AGAINST A STATE WELFARE DIRECTOR IN WHICH A FEDERAL COURT HAS UNDISPUTED JURISDICTION, THE ELEVENTH AMENDMENT DOES NOT STRIP THE COURT OF JURISDICTION TO GRANT COMPLETE EQUITABLE RELIEF, INCLUDING EQUITABLE RESTITUTION, TO REDRESS VIOLATIONS OF FEDERAL LAW.

At the outset, it must be emphasized that there is agreement between the parties that, notwithstanding the Eleventh Amendment, the federal court had jurisdiction of this suit against the Director of the Illinois Department of Public Aid under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). The Director of the Illinois Department of Public Aid does not challenge on Eleventh Amendment grounds the lower court's power to enter a mandatory injunction ordering him, his predecessors and successors, to comply with the federal time standards for processing every future AABD application in the entire state of Illinois. Nor does he challenge on Eleventh Amendment grounds the federal trial court's power both to require him to pay AABD assistance effective the last day of the federal time period in all cases in which the processing of eligible applicants is delayed and to enjoin him from enforcing the state regulation inconsistent therewith. (Pet. Br. 14) This case, then, does not raise the question of whether this suit may be brought in federal court, as in *Employees of the Department of Public Health and Welfare v. Department of Public Health and*

Welfare, 411 U.S. 279 (1973).[10] This suit is properly in federal court; and the federal court is merely exercising its "traditional jurisdiction to hear and decide federal questions in this field." *Rosado v. Wyman*, 397 U.S. 397, 422 (1970).

Moreover, the Director in effect concedes that the members of the plaintiff class were wrongfully denied the AABD benefits in question unless the federal time regulations are invalidated. (See *infra* Part III.) However, the Director maintains that the plaintiffs may not recover in this suit, as an equitable adjunct to the injunction decree, the AABD benefits which they were wrongfully denied because the Eleventh Amendment to the United States Constitution deprives the federal court of the power to order a state official to make equitable restitution to even the named plaintiff, John Jordan, in the amount of $195.66 (App. 105), as well as the power to order equitable restitution to all of the other members of the class.

What is at issue in this case, then, is whether the federal court is barred by the Eleventh Amendment from granting the relief of equitable restitution, even if warranted, as an incident to other equitable relief against

---

[10]In *Employees, supra*, the suit was filed directly against state departments for double damages and attorneys fees for alleged violations of The Fair Labor Standards Act. In contrast to this case, it was accepted that the suit in its entirety was against the State and barred from federal court by the Eleventh Amendment (unless there was a waiver by Missouri of its immunity from suit in federal court which the court held did not exist). Here, the opposite is true. It is accepted that, under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), this suit in the main is not against the State and not barred by the Eleventh Amendment, and accordingly it is not disputed that this suit against the Director is properly in federal court.

the Director of the Department of Public Aid, which, it is agreed, is not barred by the Eleventh Amendment. Respondent AABD recipients submit that this Court has rejected this contention repeatedly, albeit *sub silentio*, that this entire suit falls within the established doctrine of *Ex Parte Young*, and that the language of the Amendment itself precludes petitioner's interpretation. Moreover, at no time since the adoption of the Eleventh Amendment in the eighteenth century has this Court ever interpreted the Amendment as depriving a federal court of the power to grant full and complete equitable relief, once its jurisdiction over a suit was established.

A. This Court Has Affirmed, in the Face of Eleventh Amendment Defenses, Numerous Judgments Ordering State Officials To Make Equitable Restitution of Public Assistance Benefits Wrongfully Withheld From Public Aid Recipients.

This Court has consistently affirmed judgments requiring state directors of public aid to make equitable restitution of public assistance benefits wrongfully denied, notwithstanding Eleventh Amendment defenses by the state officers. In *State Dept. of Health and Rehabilitative Services v. Zarate*, 407 U.S. 918 (1972), *aff'g* 347 F. Supp. 1004 (S.D. Fla. 1971), this Court affirmed the decision of a three-judge court requiring, *inter alia*, restitution of public assistance benefits to aliens who had been illegally denied assistance because they were non-citizens and did not meet Florida residence requirements. The defendants, State Department of Health, and the Secretary of the State Department of Health, appealed only from that portion of the order requiring restitution of public assistance benefits wrongfully denied. The sole question presented upon the appeal was:

> Does Eleventh Amendment bar lawsuit brought by citizens or non-citizens, resulting in judgment against state officers for retroactive welfare assistance benefits or payments? 40 U.S.L.W. 3572 (May 30, 1972)

This Court answered the question in the negative by affirming summarily.

In *Sterrett v. Mothers and Children's Rights Organization*, 409 U.S. 809 (1972), *aff'g* unreported order and judgment (N.D. Ind. 1972), on remand from *Carpenter v. Sterrett*, 405 U.S. 971 (1971), this Court again summarily affirmed a judgment ordering restitution of public assistance benefits wrongfully withheld. In *Sterrett*, a three-judge district court in Indiana ruled that the denial of AFDC benefits to eligible needy children between the ages of 16 and 18 solely because they were not regularly attending school violated the Social Security Act. Retroactive benefits (restitution) to cover previously denied payments were directed by the court. (CCH Pov. Law Rptr., Vol. 2, par. 15,384) On appeal to this Court by the defendant State Commissioner, one of two questions presented was as follows:

> Is federal court precluded by Eleventh Amendment from ordering state agency to pay money from state treasury and from ordering state agency to perform specified acts which would otherwise be in discretion of agency? 41 U.S.L.W. 3126.

This Court again answered the question in the negative by summarily affirming.

Similarly, in *Gaddis v. Wyman*, 304 F. Supp. 717 (S.D. N.Y. 1968) (order at par. 10,506, Transfer Binder, CCH Pov. Law Rptr.), *aff'd per curiam sub nom. Wyman v. Bowens*, 397 U.S. 49 (1969), restitution was required for the class of persons wrongfully denied public assistance

benefits. The state public aid officials argued unsuccessfully to this Court that the granting of retroactive welfare benefits was "an incursion on the Eleventh Amendment." Brief for Appellants, at p. 18. And in *Shapiro v. Thompson*, 270 F. Supp. 331, 338 n.5 (D. Conn. 1967), *aff'd*, 394 U.S. 168 (1969), this Court affirmed, without reference to the Eleventh Amendment, the decision of the lower court which, in ordering restitution of benefits wrongfully denied, expressly rejected an Eleventh Amendment defense, relying primarily on *Ex Parte Young*, 209 U.S. 123 (1908).

In addition, this Court has summarily affirmed other opinions and judgments which, without any discussion of the Eleventh Amendment, ordered state welfare directors to make equitable restitution to public assistance recipients of benefits wrongfully withheld.[11] *Rodriguez v. Swank*, 403 U.S. 901 (1971), *aff'g* 318 F. Supp. 289 (N.D. Ill. 1970) (order at App. 22-29); *Doe v. Weaver*, 404 U.S. 987 (1971), *aff'g* 332 F. Supp. 61 (N.D. Ill. 1970); *Grubb v. Sterrett*, 400 U.S. 922 (1971) *aff'g* 315 F. Supp. 990 (N.D. Ind. 1970). In *Graham v. Richardson*,

[11]In addition to the cases affirmed by this Court, there is a formidable body of federal decisions throughout the country which, without mentioning the Eleventh Amendment, have ordered state officials to make restitution to public aid recipients of benefits wrongfully denied. *McDonald v. Dept. of Public Welfare*, 430 F.2d 1268 (5th Cir. 1970); *Wilson v. Weaver*, 358 F.Supp. 1147, 1152 (N.D. Ill. 1973); *Alexander v. Weaver*, 345 F.Supp. 666 (N.D. Ill. 1972); *Schaak v. Schmidt*, 344 F.Supp. 99, 104 (E.D. Wis. 1971); *Alvarado v. Schmidt*, 317 F.Supp. 1027 (W.D. Wis. 1970); *Stoddard v. Fisher*, 330 F.Supp. 566 (D. Me. 1971); *Tripplett v. Cobb*, 331 F.Supp. 652 (N.D. Miss. 1971); *Baxter v. Birkins*, 331 F.Supp. 222, 226 (D. Colo. 1970); *Ojeda v. Hackney*, 319 F.Supp. 149 (N.D. Tex. 1970); *Brooks v. Yeatman*, 311 F.Supp. 364 (M.D. Tenn. 1970); *Machado v. Hackney*, 299 F.Supp. 644 (W.D. Tex. 1969). In *Lewis v. Riggins* (N.D. Ind. 1971, 71 H 19) (attached to Plaintiffs' Reply Brief, Item 56), the court required restitution of public assistance benefits wrongfully denied in circumstances almost identical to this case.

403 U.S. 365, 367-68 (1971), involving the unconstitutional denial of welfare benefits to aliens, this Court referred to the plaintiffs' complaints as seeking "the award of amounts allegedly due," and, "the ordering of back payments wrongfully withheld," and, without discussion of such relief, affirmed. As stated in *Gaither v. Sterrett*, 346 F. Supp. 1095, 1099 (N.D. Ind. 1972), *aff'd*, 93 S.Ct. 688 (1973):

> "[T]his court would note that if defendant's position regarding the jurisdictional bar of the Eleventh Amendment is correct, a great number of federal district court judgments are void and the Supreme Court has affirmed many of these void judgments."

In sum, then, while the respondent welfare recipients maintain that the Supreme Court decisions described above reject the Eleventh Amendment defense, a statement of the reasons underlying rejection of the Eleventh Amendment as a bar to equitable restitution in these public assistance cases awaits formulation. The Seventh Circuit reasoned that the Eleventh Amendment was not a bar to such relief based on the long-established doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). *Jordan v. Weaver*, 472 F.2d at 990-94.[12]

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[12]Petitioner relies on *Rothstein v. Wyman*, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973), which concludes that the Eleventh Amendment bars equitable restitution. It should be noted that the reasoning of *Rothstein*, with respect to the Eleventh Amendment bar, has been repudiated in *Story v. Roberts*, 352 F. Supp. 473 (M.D. Fla. 1972) (prior to the Seventh Circuit opinion in *Jordan*); *Silvey v. Roberts*, ___,F. Supp.___ (M.D. Fla., Aug. 3, 1973) and in *Frey v. Lukehard*, 361 F. Supp. 60 (W.D. Va. 1973). In the latter two cases, the courts expressed agreement with the reasoning of the Seventh Circuit in the instant case.

B. Under the Doctrine of *Ex Parte Young*, a State Official Acting on Contravention of Paramount Federal Law Is Stripped of His Official or Representative Capacity and Is Not Protected by Eleventh Amendment State Immunity.

In this case the Director of the Illinois Department of Public Aid acknowledges that under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), the federal court here is neither stripped of judicial power by the Eleventh Amendment "from ordering state officials to bring their conduct into conformity with federal law," nor from entering a "mandatory injunction" against a state official. (Pet. Br. at 14) But at the point where the federal court grants restitution of AABD benefits wrongfully denied to the parties actually injured by the actions of the Director of the Illinois Department of Public Aid, the petitioner seeks to raise the shield of the Eleventh Amendment as a barrier. The Eleventh Amendment, however, relates to the immunity of States. Thus, the Director must be claiming that when he violated federal law, he was acting under the authority of the state. But it has been settled law since *Ex Parte Young*, 209 U.S. 123 (1908), that when a state official violates paramount federal law, his act is

> "without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official . . . and he is in that case stripped of his official or representative character . . . The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Id.* at 159-160.

In *Ex Parte Young, supra,* the plaintiffs sought to enjoin the Attorney General of the State of Minnesota

and the members of the state warehouse and railroad commission, from enforcing state legislation setting allegedly confiscatory railroad rates, and further sought to enjoin the railroad company from adopting the prescribed rates. In addition, the plaintiffs challenged the provisions of the legislation establishing enormous penalties, both monetary fines and criminal sanctions, for violations of the prescribed rates. *Ab initio*, the Attorney General argued that the court had no jurisdiction over him because the suit was in effect against the state, and was therefore barred by the Eleventh Amendment. Notwithstanding this defense, the federal court entered a preliminary injunction enjoining the Attorney General from enforcing the challenged legislation in the state courts. The Attorney General, in violation of this order, filed a mandamus petition in state court to enforce the legislation. In response to a rule to show cause why he should not be held in contempt of court, the defendant again pleaded the Eleventh Amendment defense. The court found him in contempt, imposed a fine, and ordered him to dismiss the mandamus proceedings brought by him in the name of the state.

In its landmark decision, the Court upheld the jurisdiction of the federal court in the suit against the state official notwithstanding the Eleventh Amendment. Based on the reasoning quoted above, the Court established the principle that state officers, acting in violation of paramount federal law, could not claim the protective shield of the Eleventh Amendment. State immunity under the Eleventh Amendment could not be imparted to a state official so as to give him "immunity from responsibility to the supreme authority of the United States." (*Id.* at 160)

In the instant case, the Director of the state welfare department raises the Eleventh Amendment defense in

almost identical circumstances to that of the Attorney General of Minnesota. Both were acting in violation of federal law; both also knew that their actions were contrary to federal law but persisted in their illegality. In *Young*, the federal court had undisputed jurisdiction over some of the parties and further exercised jurisdiction over Young to be able to grant full and appropriate relief. Similarly, in this case, the Director of Public Aid concedes that the federal court has jurisdiction over the suit, but argues that the Eleventh Amendment bars equitable restitution, the only relief that redresses the injury to the members of the plaintiff class harmed by the defendant's actions. Just as the state officer in *Young* could not claim Eleventh Amendment immunity from suit in federal court, the Director of the Illinois Department of Public Aid may not claim such immunity to shield his illegal actions and to bar relief to redress the deprivation of federal rights.

As stated in *Sterling v. Constantin*, 287 U.S. 378, 393 (1932), state officials purporting to act under state authority who invade rights secured by paramount federal law, "are subject to the process of the federal courts in order that the persons injured may have appropriate relief." In that case, the Governor had acted to nullify an interlocutory order of the court whereas in this case the Director of Public Aid had acted to nullify the order of the three-judge court in *Rodriguez* and the federal law relating to processing of applications of needy aged, blind, and disabled persons. In both cases, the responsibility of the state officers was "to aid in making its [the federal court's] process effective and not to nullify it; to remove, and not to create, obstructions to the exercise by the complainants of their rights as judicially declared." *Sterling v. Constantin*, 287 U.S. 378, 404 (1932).

Under the circumstances of this case, there is no basis for allowing the State of Illinois to impart to the Director of the Department of Public Aid "any immunity from responsibility to the supreme authority of the United States." (*Ex Parte Young, supra* at 159-160) or allowing the Director to claim state immunity. Immunity from suit is a high attribute of sovereignty and must not be held to provide a shield for illegal acts of public agents. Petitioner cites no case law or historical support for the proposition that the Eleventh Amendment was intended to bar relief for injuries incurred as a result of the individual illegal acts, whether deliberate or otherwise, of state officers, such as in the instant case. *Compare Hans v. Louisiana*, 134 U.S. 1 (1890).

Moreover, *Ex Parte Young* establishes that a state officer, acting in violation of paramount federal law, is "stripped of his official or representative character," (*Id.* at 160), and, accordingly, suits against state officers under these circumstances are not suits against the state. See generally, Davis, *Suing The Government by Falsely Pretending to Sue an Officer*, 29 U. Chi. L. Rev. 435 (1962). This principle underlies the conclusion that this suit against the Director of the Department of Public Aid is not against the State of Illinois within the meaning of the Eleventh Amendment.[13] If the provisions of the judgment ordering the Director of Public Aid to process all AABD applications in Illinois in the future in compliance with federal law and ordering him to pay AABD effective at the very latest as of the last day of the maximum time period for all future eligible applicants in Illinois, do not amount to relief against the State of

[13]See *La. State Bd. of Education v. Baker*, 339 F.2d 911 (5th Cir. 1964).

Illinois, as is conceded, this logic must also embrace the provisions of the judgment ordering the Director to make equitable restitution of AABD benefits wrongfully withheld. In all instances the Director is "stripped of his official or representative character," particularly, where the established facts are, as here, that the Director was fully aware of the violations of federal law.

Significantly, the rationale of *Ex Parte Young* that a state officer, when acting in violation of the law, is not acting on behalf of the sovereign, and therefore may not claim state immunity from suit, is wholly consistent with Illinois law. It is settled under Illinois law that suits against state officials acting in violation of law are not suits against the State. *County of Cook v. Ogilvie*, 50 Ill.2d 379, 280 N.E.2d 224 (1972); *Rodriguez v. Swank*, 318 F. Supp. 289, 296 (N.D. Ill. 1970), *aff'd*, 403 U.S. 901 (1971). Thus under Illinois law this suit would not be considered against the State and, therefore, the Eleventh Amendment issue, based on state law, is not joined.[14] *Aerojet General Corp. v. Askew*, 453 F.2d 819 (5th Cir. 1971), *pet. for rehearing denied*, 453 F.2d 836 (1972).

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[14]The reasoning in *Chicago Welfare Rights Organ. v. Weaver*, 5 Ill. App. 3d 655, 284 N.E.2d 20 (1972), relied on by petitioner (Pet. Br. 34-36) has recently been rejected by the Illinois Supreme Court, ___ Ill.2d ___ (Sept. 25, 1973). In its decision, the Illinois Supreme Court held that 1983 actions by welfare recipients, such as the instant one, may not be brought in state court, except pursuant to the Illinois Administrative Review Act, ch. 110, §264 *et seq.*, and, on this ground, affirmed the judgment of the appellate court dismissing the action. This decision, it appears, denies a class of welfare recipients, such as in this case, a remedy of equitable restitution in Illinois courts, since it is not possible to proceed as a class under the Illinois Administrative Review Act.

C. The Eleventh Amendment Has Never Been Interpreted by This Court as Restricting the Judicial Power of a Federal Court With Respect to the Granting of Appropriate Equitable Relief in a Suit Over Which It Has Undisputed Jurisdiction.

The proposition urged by the petitioner, i.e., that the Eleventh Amendment deprives the federal court here of the judicial power to grant full and complete equitable relief to the plaintiffs, is wholly inconsistent with the language of the Amendment,[15] is unsupported by any holding of this Court, and represents a radical departure from previous Eleventh Amendment cases. First, the language of the Amendment itself states that the judicial power of the federal courts "shall not be construed to extend to any suit" against "one of the United States." The Director of Public Aid, however, concedes that under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), the plaintiffs may bring this "suit" against him in federal court to enjoin the enforcement of illegal state regulations, and to require him to comply with federal time requirements in processing AABD applications. (Pet. Br.

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[15]The Eleventh Amendment provides:

"The Judicial Power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of any Foreign State."

The Eleventh Amendment was adopted in response to the decision of the Court in *Chisholm v. Georgia*, 2 Dall. 419, 1 L.Ed. 440 (1973) and in effect, reversed this holding. *See generally*, Jacobs, *The Eleventh Amendment and Sovereign Immunity* (1972). Petitioner here relies exclusively on Eleventh Amendment immunity from suit in federal court, and does not argue that the relief in question is barred by the common law doctrine of sovereign immunity.

14) Thus, the Eleventh Amendment is not a bar to the "suit" in federal court against the Director, but, it is argued, is a bar to the incidental equitable relief of equitable restitution. But the literal language of the Eleventh Amendment in no way constricts the breadth of equitable relief which might be granted by a federal court. Once the threshold jurisdictional question is overcome, and the suit against a state officer is within the jurisdiction of the federal court and not barred by the Eleventh Amendment, as it is in this case, then the Eleventh Amendment has no relevancy to the question of proper relief. Instead, the Eleventh Amendment, and cases interpreting it, relate to the issue of whether a "suit," as a whole, against a state officer or state agency may be heard in federal court. *E.g., Griffin v. School Board of Prince Edward County*, 377 U.S. 218, 228 (1964); *Georgia Railroad & Banking Co. v. Redwine*, 342 U.S. 299 (1952); *Ex Parte Young*, 209 U.S. 123 (1908). The contention that the Eleventh Amendment may restrict the equitable powers of the federal court is a radical notion, never before acknowledged by this Court.[16]

To the contrary, once jurisdiction over the state officer is secured, this Court has made clear that the federal courts may exercise the full scope of their equitable powers to fashion appropriate equitable relief. In *Griffin v. School Board of Prince Edward County*, 377 U.S. 218

[16]Reliance by petitioner (Pet. Br. at 37) on *Louisiana v. Jumel*, 107 U.S. 711 (1883); *Hagood v. Southern*, 117 U.S. 52 (1886); and *North Carolina v. Temple*, 134 U.S. 22 (1890), is misplaced because the issue presented in those cases was whether the "suit" could be heard in federal court. Even on that point, the reasoning and holdings in those cases are in effect repudiated by the doctrine announced in *Ex Parte Young*, 209 U.S. 123 (1908).

(1964), the plaintiffs claimed that the closing of the public schools in Prince Edward County while maintaining public schools in all the other counties of Virginia, denied the petitioners and the class they represented the equal protection of the laws guaranteed by the Fourteenth Amendment. While recognizing that "actions of the State are involved," the Court rejected the argument by the state officials that the suit was against the State within the meaning of the Eleventh Amendment. *Id.* at 228. Having disposed of the threshold jurisdictional issue, and then deciding in favor of the plaintiffs on the substantive issue, the Court proceeded to elaborate on the power of the federal court to fashion a "decree necessary and appropriate to put an end to racial discrimination." Not only were prohibitory injunctions appropriate, but also "the District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County . . ." (*Id.* at 233) and also the Discrict Court could, if appropriate, enter an order requiring the reopening of the public schools.

In *Sterling v. Constantin*, 287 U.S. 378 (1932), a suit against the Governor of Texas and other state officials to enjoin limitations placed on the production of oil from plaintiff's wells, the Court first resolved the threshold jurisdictional issue involving the Eleventh Amendment in favor of the plaintiff. *Id.* at 393. Once jurisdiction was established, the Court rejected the defendant's contention that an injunction was improper and emphasized that the federal court had the power to grant appropriate equitable relief.

> "The suggestion confuses the question of judicial power with that of judicial remedy. If the matter is

one of judicial cognizance, it is because of an alleged invasion of a right, and the judicial power necessarily extends to the granting of the relief found to be appropriate according to the circumstances of the case." 287 U.S. at 403.

See *Ex Parte Young*, 209 U.S. 123, 166 (1908)

Similarly, the Eleventh Amendment has never been a bar to the fashioning of appropriate equitable relief against state officers in reapportionment cases. *E.g., Sims v. Amos*, 336 F. Supp. 924 (M.D. Ala. 1972) (supplemented in 340 F. Supp. 691), *aff'd* 93 S.Ct. 290 (1972); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

Indeed, there is no decision by this Court in which the Eleventh Amendment has been interpreted as a bar to the federal court's power to grant complete and appropriate equitable relief. The function of the Eleventh Amendment is to bar certain kinds of suits from being heard in the federal courts. But if the suit against the particular defendant may be heard and decided in federal court under the doctrine of *Ex Parte Young*, the question of appropriate relief is separate and distinct from the bar of the Eleventh Amendment. The relief of equitable restitution, incident to the primary issue of the legality of the defendant's practices and regulations (*Rodriguez v. Swank*, 318 F. Supp. 289, 295 (N.D. Ill. 1970), *aff'd* 403 U.S. 901 (1971); *Samuel v. Univ. of Pittsburgh*, 56 F.R.D. 435, 440 (W.D. Pa. 1972)) does not independently trigger the Eleventh Amendment bar. Otherwise, a federal court will be unable to give "complete rather than truncated justice." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (see *infra* at 53-54)

Any attempt to draw distinctions between the prospective relief and the equitable restitution relief in terms of the applicability of the Eleventh Amendment leads to

an untenable interpretation of that Amendment.[17] The consequence of petitioner's position (Pet. Br. 31) would be that under the Eleventh Amendment the judicial power of the federal court does extend to prospective relief enjoining state officials from violating the federal rights of persons not before the court (future AABD applicants), but the judicial power does not extend to equitable relief against public officials to redress the deprivations of the federal rights of plaintiffs before the court, such as John Jordan. In addition, petitioner's position would mean that while federal courts may invalidate state legislation and enjoin state officials from enforcing such legislation, as is commonplace, without running afoul of the Eleventh Amendment immunity of states, federal courts may not require state officials to make restitution incident to the enjoining of illegal state regulations because of the Eleventh Amendment. To suggest that the former is not a suit against the state but the latter is, is capricious and illogical. As long as *Ex Parte Young* remains the law—and it has been described

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[17]Petitioner attempts to place Eleventh Amendment significance on the fact that with respect to the prospective relief, Illinois has the option to consent to it, but it does not have such option with respect to retrospective relief. (Pet. Br. 31) However, consent is relevant only if the Eleventh Amendment applies to a suit. (See Part II *infra.*) The threshold question is whether the Eleventh Amendment is even applicable, or whether the state official may claim Eleventh Amendment immunity under the particular circumstances. Retrospective relief, of course, is necessary to redress past wrong. For example, in *Vlandis v. Kline*, 409 U.S. 1036 (1973), *aff'g* 346 F.Supp. 526 (D. Conn. 1972), after finding unconstitutional the state statute defining nonresidents for purposes of charging higher tuition at the state university, the Court upheld a refund to the plaintiffs of the excess tuition that they paid but should not have.

as "indispensable to the establishment of constitutional government and the rule of law," C. Wright, *Handbook of the Law of Federal Courts* 186 (2d ed. 1970)—the doctrine must permit federal courts in suits against state officers to grant full and complete equitable relief under the circumstances of each case.[18]

D. Equitable Relief Which Has an Impact on the State Treasury Is Not Barred by the Eleventh Amendment.

Relying on three cases involving state taxes (*Kennecott Copper Corp. v. State Tax Commission*, 327 U.S. 573 (1946); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945); *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47 (1944), the state welfare director asserts that any suit seeking a monetary award from the treasury of a local body politic is a suit against the State barred by the Eleventh Amendment. (Pet. Br. 29) These cases, however, do not establish any such principle, nor are they relevant to the issues presented in this case.

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[18]If *Ex Parte Young* is held not to govern this suit, then, this Court must face the question of whether the Fourteenth Amendment to the United States Constitution, with special reference to Section 5, implicitly overrides the Eleventh Amendment to the extent that it authorizes Congress to enact laws to enforce the Fourteenth Amendment. Respondents maintain that this Amendment supersedes the Eleventh Amendment bar to the extent that it authorizes Congress to establish federal court jurisdiction of suits against state officers to redress the deprivation of federal rights, to-wit: 42 U.S.C. §1343(3) and 1983. See *Lynch v. Household Finance Corp.*, 405 U.S. 538, 543 n.7, 548 n.15, and 549 n.16 (1972); *Mitchum v. Foster*, 407 U.S. 225, 240 n.30 (1972); *Monroe v. Pape*, 365 U.S. 167 (1961); *Prout v. Starr*, 188 U.S. 537, 543 (1903). This suit, brought pursuant to Section 1983, falls within this ambit. (See *infra* IV.B.)

All three of these opinions, written by Justice Reed, involve suits by nonresidents pursuant to state-created causes of action for refund of state taxes. It was not conceded in any case that the case was properly in federal court as here; to the contrary, the question was precisely whether the suit could be brought in federal court in the face of the Eleventh Amendment. The Court never reached the question whether the tax assessments were in violation of federal law, in contradistinction to the substantive ruling in this case finding a violation of federal law. Moreover, the *Ex Parte Young* question of whether a state official could claim the shield of state immunity was not posed in any of the tax cases. Instead, the Court merely reviewed the state statutes sued under and concluded that the suits were against the respective states and that the state statutes did not establish consent to suit in federal court. Certainly there is nothing in the ratio decidendi of these cases to support the sweeping proposition announced in *Rothstein v. Wyman*, 467 F.2d at 236, and urged by the petitioner, that equitable relief against state officials which has a monetary impact upon the State is barred by the Eleventh Amendment. At most, these state tax cases reflect the unique considerations that surround federal judicial interference with enforcement of state tax law and the underlying policy of the federal courts not to decide these cases where an adequate remedy is otherwise available.[19] See *Lynch v.*

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[19] "The advantage of having state courts pass initially upon questions which involve the state's liability for tax refunds is illustrative by the instant case where petitioner sued in a federal court for a refund only to urge on certiorari that the federal court erred in its interpretation of the state law . . . ." *Ford Motor Co. v. Treasury Dept.*, 323 U.S. at 470.

No such state issues are present in welfare cases such as this one.

Household Finance Corp., 405 U.S. 538, 542 n.6 (1972); *Perez v. Ledesma*, 401 U.S. 82, 126 (1971) (concurring opinion of Justice Brennan).

Petitioner's reliance (Pet. Br. 30) on the dicta in *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 464 (1944) is misplaced. The Court in deciding when "the State is the real, substantive party in interest and is entitled to invoke its sovereign immunity from suit even though individual officers are nominal defendants," was examining the state law provisions under which plaintiffs sued for a tax refund to answer the threshold question whether the suit was against the State. Based on the state tax provisions, the Court concluded that the suit was against the state, whereas, in this case, both under Illinois law and under the doctrine of *Ex Parte Young*, this suit is not against the State within the meaning of the Eleventh Amendment. Since the Court in *Ford Motor Co.* concluded that the case was barred, *ab initio*, from federal court, obviously, the Court never reached the question of whether, in cases where federal courts have jurisdiction over state officers, equitable relief which has an impact on the state treasury is barred by the Eleventh Amendment.

In reality, in almost all cases in federal court involving injunctive relief against state officials, the relief granted has a monetary impact on the state. Indeed, the portion of the equitable relief in this case which required strict compliance with the federal time standards "requires the expenditure of more monies than the seriously disputed part of the judgment requiring the payment of wrongfully withheld benefits." *Jordan v. Weaver*, 472 F.2d at 991. Yet, the petitioner concedes the former relief is not barred by the Eleventh Amendment. Moreover, petitioner does not attempt to refute the fact that this Court has repeatedly affirmed judgments in public assistance cases,

including the companion case of *Rodriguez v. Swank, supra,* which have imposed substantial liabilities on state treasuries. (Cases discussed in I.A., *supra.*)

Turning to other cases, equitable relief which has an impact upon the state treasury has been regularly granted against state officials. *E.g., Vlandis v. Kline*, 409 U.S. 1036 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Wesberry v. Sanders*, 376 U.S. 1 (1964). In *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 233 (1964), the Court stated that it would be proper for the lower court to order the reopening of public schools in the county, and, if necessary, to order the levying of taxes to maintain such schools.[20] In *Baker v. Carr*, 369 U.S. 186 (1962), and its progeny, this Court has required reapportionment of various legislative bodies and new elections thereunder, all at a considerable cost to states.[21] Similarly, in *Jackson v. Ogilvie*, 426 F.2d 1333 (7th Cir. 1970), *cert. denied*, 400 U.S. 833 (1970), the court

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[20]See *School Board of Charlottesville v. Allen*, 240 F.2d 59, 62-63 (4th Cir. 1956), *cert. denied* 353 U.S. 910 (1957).

[21]In *Sims v. Amos*, 340 F.Supp. 691 (M.D. Ala. 1972), the court not only ordered the Alabama state legislature reapportioned, but also levied costs and attorneys fees of a considerable amount against the state officers. Similarly, in *LaRaza Unida v. Volpe*, 57 F.R.D. 94, 101-02 (N.D. Cal. 1972), the court in imposing attorneys fees against a state officer concluded "that the state may no more immunize an individual from costs incident to an injunction than it may insulate him from the injunction itself."

approved the issuance of a mandatory injunction requiring the Governor to call an election which would cost the state $400,000.[22]

In the seminal case of *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat) 738 (1824), the Court, in the face of the Eleventh Amendment, specifically directed restitution by the State treasurer of funds collected as a result of an illegal tax on a federally chartered bank. In that case, the Court answered in the affirmative the question of "whether an injunction can be issued to restrain a person, who is a state officer, from performing any official act enjoined by statute; and whether a court of equity can decree restitution, if the act be performed." *Id.* at 838. This holding and the governing principle were summarized in *Perez v. Ledesma*, 401 U.S. 82, 105-6 (1971) (Brennan, J., concurring):

> "Though recognizing the sensitivity of granting injunctions in this context, the Court held that neither the Eleventh Amendment nor any principles of federalism prevented the lower courts from giving

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[22]In *Holt v. Sarver*, 442 F.2d 304, 306-7 (8th Cir. 1971), a case involving prison conditions, the court expressly rejected the Eleventh Amendment as a bar to the suit, and recognized "that the prison units here in controversy are state agencies and that the funds necessary to operate the institutions must come from state appropriations." In *Jones v. Wittenberg*, 330 F. Supp 707 (N.D. Ohio 1971), *aff'd sub nom. Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972), and in *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), mental health and jail officials were ordered to take extensive affirmative remedial steps, requiring the appropriation of funds, in order to redress the deprivation of federal rights. See also *Cook v. Davis*, 178 F.2d 595 (5th Cir. 1949), *cert. denied*, 340 U.S. 811 (1950).

> such relief where necessary to vindicate paramount federal law . . . [T]he basic principle that in appropriate circumstances federal courts will exercise their equity power against state officials to protect rights secured and activities authorized by paramount federal law remains firmly embedded in our jurisprudence."

In sum, the fact that an injunction has an impact on the state treasury is of no legal consequence whatsoever insofar as the applicability of the Eleventh Amendment.

The conclusion that the Eleventh Amendment does not bar a federal court from granting equitable restitution against a state officer does not mean that a federal court, in the exercise of its equity powers, should not take into account principles of equity, comity, and federalism. It is these restraints on equitable discretion (see Part IV *infra*), and not the Eleventh Amendment, which circumscribe a federal court's actions in suits over which there is undisputed jurisdiction under the doctrine of *Ex Parte Young*.

II.

ASSUMING, ARGUENDO, THAT THIS IS A SUIT AGAINST THE STATE, ILLINOIS HAS CONSENTED TO THIS SUIT IN FEDERAL COURT.

A. Illinois Has Consented to This Suit in Federal Court by Its Actions in Defending the Suit and Its Failure To Raise the Absence of Consent and the Eleventh Amendment Defense in a Timely Manner Before the Trial Court.

At no time prior to the decision and judgment of the lower court did petitioner assert Eleventh Amendment immunity as a bar to equitable restitution. In his answer, the jurisdiction of the court was admitted. (App. 58,

para. 2 and 3) Only after an adverse decision on the merits and the entry of an order granting the relief prayed for in the complaint,[23] and the filing of the notice of appeal, did petitioner belatedly attempt to claim the protection of the Eleventh Amendment.

This contention comes too late. As the Eleventh Amendment provides "... an immunity which a state may waive at its pleasure (*Missouri v. Fiske*, 290 U.S. 18, 24) as by a general appearance in litigation in a federal court (*Clark v. Barnard*, 108 U.S. 436, 447-448))," *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 276 (1959), unless immunity is claimed initially, it must be assumed that consent is given to the jurisdiction of the court. Although this Court has not previously determined at what precise stage in the proceedings the claim of Eleventh Amendment immunity will be foreclosed due to failure to raise it in a timely manner, policies underlying the established rules of law on waiver of objections to personal jurisdiction and considerations particular to Eleventh Amendment immunity dictate a cut-off point prior to the initiation of the appellate process.

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[23]In seeking to excuse his failure to raise the Eleventh Amendment defense in the trial court, petitioner states: "Respondents never sought retroactive benefits in their prayers for relief ..." (Brief for petitioner, p. 13) Petitioner presumably overlooked paragraph 5 of the prayer for relief in the complaint (App. 14) and the amended complaint (App. 47) which ask that the court "Enter a permanent injunction enjoining the defendants to award to the entire class of plaintiffs all AABD benefits wrongfully withheld." Moreover, the restitution issue was fully briefed by the plaintiffs prior to judgment. (R. Item 48) Finally, the Director was certainly aware of the judgment in *Rodriguez v. Swank* (App. 22-29) which had granted restitution to the class of AFDC recipients in Illinois.

1. *Eleventh Amendment Immunity is in the Nature of a Privilege of Personal Jurisdiction Which is Deemed Waived by the Failure to Raise it in a Timely Fashion.*

Immunity from suit under the Eleventh Amendment has been described as "a personal privilege which may be waived." *Missouri v. Fiske*, 290 U.S. 18 24 (1933). Indeed, it is the historical attribute of waivability which makes the protection of the Eleventh Amendment comparable to aspects of personal jurisdiction such as venue, rather than to restrictions on subject-matter jurisdiction.[24] As with other examples of personal privilege, Eleventh Amendment immunity should be raised in a timely manner or consent should be deemed to have been given to the jurisdiction of the court.

The rule in federal courts is that in order to preserve a defense based on personal privilege, the party claiming the privilege must raise the issue before the trial court moves to a consideration of the merits of the case. For example, an objection to venue is waived by failure of the party claiming the privilege to raise the issue by motion or answer in the trial court. *Panama R.R. Co. v. Johnson*, 264 U.S. 375 (1924). This rule reflects the policy of preventing a party who has appeared and litigated on the merits from claiming the protection of the privilege at a later time to avoid the effect of an adverse determination.

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[24] Analyzing Eleventh Amendment immunity in this way avoids an apparent contradiction between the ability of a state to consent to suit and the basic concept of limited federal jurisdiction. Compare *Employees v. Department of Public Health and Welfare*, 411 U.S. 279 (1973), Opinions of Marshall, J., at 294-95, n.10 and Brennan, J., at 321-22.

Since the privilege is for the benefit of the litigant, it is deemed waived unless raised by motion or answer.[25]

Similarly, when the Eleventh Amendment privilege can be raised by a state, appearing without claiming the protection of the Amendment constitutes consent to suit. *Petty, supra; Clark v. Barnard*, 108 U.S. 436.

> "Although a state may not be sued without its consent, such immunity is a privilege which may be waived, and hence where a state voluntarily becomes a party to a cause and submits its rights to judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment." *Gunter v. Atlantic Coastline R.R. Co.*, 200 U.S. 273, 284 (1905)[26]

In the instant case, petitioner appeared, answered and defended to judgment. The claim of immunity, asserted only after the entry of an adverse decision and judgment by the trial court, must be held foreclosed. This was the conclusion in *Lidie v. State of California*, 478 F.2d 552, 556 (9th Cir. 1973), which refused to consider the state's claim of Eleventh Amendment immunity when raised for the first time on appeal. The Ninth Circuit held that the defendants waived whatever protection they may have

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[25]This approach is consonant with the general rule in state courts which holds that sovereign immunity is a matter of personal jurisdiction which can be waived. *E.g., City of Kenosha v. State*, 151 N.W.2d 36, 35 Wis.2d 317 (1967).

[26]Prior to the *Gunter* case, the Attorney General had unsuccessfully defended a suit brought by stockholders of a corporation to enjoin its taxation. (*Humphrey v. Pegues*, 834 U.S. (16 Wall.) 244 (1872). *Gunter* was considered ancillary to the first action and the state's claim of immunity, though raised at the outset of the second suit, was disallowed.

had by failure to raise the defense at an appropriate time in the trial court. And see *Great Northern Insurance Co. v. Read*, 322 U.S. 47, 64 (1943) (Frankfurter, J., dissenting).

2. *Unique Aspects of Eleventh Amendment Immunity Reinforce the General Rule on Waiver of Such a Privilege by Failure to Raise it in the Trial Court.*

Factors particular to Eleventh Amendment immunity necessitate that the party claiming its protection invoke it or be held to have waived it and consented to suit. Where a suit is against an individual official by name, as in the instant case, questions can arise as to whether the action is a suit against the state within the meaning of the Eleventh Amendment and whether any Eleventh Amendment protection can be claimed—or waived—by the named defendant. *E.g., Ex Parte Young*, 209 U.S. 123 (1908); *Georgia Railroad and Banking Co. v. Redwine*, 342 U.S. 299 (1952).

Petitioner cites *Ford Motor Co. v. Department of Treasury of State of Indiana*, 323 U.S. 459 (1945), in order to excuse on grounds of irrelevancy his failure to claim Eleventh Amendment protection in the trial court (Pet. Br. 14). In *Ford*, the state having been sued directly, the Court found that failure to raise the issue of immunity below would constitute waiver if the officers had the power to waive immunity for the state, but held as a matter of state statutory construction that they did not.[27] *Id.* at 467-469.

[27]Relying on *Ford*, petitioner asserts that as a matter of Illinois law an assistant attorney general cannot waive the state's immunity. (Pet. Br. 14-16) Whether this is a correct formulation of Illinois law is doubtful (see *Monroe v. Collins*, 66 N.E.2d 670, 393 Ill. 553 (1946), as is the wisdom of this position if its expression is indeed accurate.

In this case, however, the petitioner is a state official who, it is submitted, as a matter of state law (*County of Cook v. Ogilvie*, 40 Ill.2d 379, 280 N.E.2d 224 (1972)) and federal law (*Ex Parte Young*) cannot claim the immunity of the state if acting illegally. (See Section I.B., *supra*) Conversely, if petitioner is able to successfully claim any immunity, he must be doing so as the representative of the state in this litigation, in which case his reciprocal power to disclaim immunity should logically be implied. *Cf. Ford, supra.*

In addition, as with other personal privileges, merely claiming Eleventh Amendment protection in the regular procedure of the case need not conclude the issue. In the face of timely and properly presented claim of immunity, the court may nevertheless find constructive waiver. *E.g., Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959); *Parden v. Terminal R.R. Co.*, 377 U.S. 184 (1964). (See *infra* II.B.) In the Eleventh Amendment area, the issue of constructive waiver is a matter of federal law, based on an examination in each situation of the intent of Congress to subject the state to suit and of the actions of the state which constitute its consent. *Parden, supra,* at 196.

Whatever their ultimate resolution, an inquiry into any of these crucial matters will only be initiated in the trial court if defendant attempts to claim state's immunity. If, as here, the defendant official does not raise any immunity privilege against suit by motion or answer, the plaintiffs and the trial court must assume that the action is not to be considered a suit against the state or, if it is being so considered, that the official is exercising his power to consent to suit on behalf of the state, or that the state concedes constructive consent.

Not to hold the issue of immunity foreclosed by defendant official's failure to raise it would be manifestly

unfair to plaintiffs who have been deprived of their opportunity to adequately meet it on the record. It would also hinder appellate review by failing to insure that complex issues which require detailed analysis of law, policy, and fact in that area of activity which is the subject of a particular suit receive first consideration by the lower courts. For these reasons, whether Eleventh Amendment immunity is jurisdictional or in the nature of a personal privilege, "it should be raised by answer or other pleading in the regular process of the case." *Illinois Central R.R. Co. v. Adams*, 180 U.S. 28, 38 (1901). Waiver never having been considered in this case prior to judgment due to defendant's failure to claim Eleventh Amendment immunity, either consent to the suit must be assumed or the Court should refuse to review this improperly preserved issue.

B. Illinois Constructively Consented to Suit by Voluntarily Choosing To Participate in the Federal AABD Program and Receiving Federal Funds Thereunder.

The Seventh Circuit concluded that Illinois had consented to this suit in federal court based on the constructive consent doctrine. *Jordan v. Weaver*, 472 F.2d at 994-996. The question presented is whether Illinois' voluntary decision to participate in the AABD program, to receive federal funds thereunder, and to abide by federal requirements, and the intent of Congress in enacting the AABD program, bring this case within the principles of *Parden v. Terminal R.R. Co.*, 377 U.S. 184 (1964) and *Petty v. Tennessee-Missouri Comm'n.*, 359 U.S. 275 (1959), or those of *Employees of the Dept. of Public Health and Welfare v. Dept. of Public Health and Welfare*, 411 U.S. 279 (1973). These cases establish the

outer parameters of the constructive consent doctrine. In *Parden*, the Court concluded that "Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to each suit [in federal court] as was authorized by that act." 377 U.S. at 192. In *Petty v. Tennessee-Missouri Comm'n*, 359 U.S. 275 (1959), the Court concluded that the two states entered into a compact, approved by Congress, to build a bridge and operate ferries over a navigable river "under conditions that make it clear that the States accepting it waived any immunity from suit which they otherwise might have." *Id.* at 280. Respondent AABD recipients maintain that Illinois, by choosing to participate in the AABD program, and agreeing to comply with federal requirements, has accepted a scheme of cooperative federalism under conditions which make it clear that it has waived any immunity from suit it otherwise might have.[28]

In this case, the Social Security Act establishes a federal-state welfare program for aged, blind, and disabled persons, where the states opt to participate for the benefit of eligible persons on the express condition that the states administer the program in conformity with federal requirements. 42 U.S.C. §1381-1385. Illinois has submitted a state plan that commits it to conform to federal requirements and, in particular, to the heart of the AABD program, to provide AABD assistance to eligible recipients.[29] *King v. Smith*, 392 U.S. 309 (1968);

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[28]In Butz v. Carter (No. 73-546), the Solicitor General in his petition for certiorari, filed September 1973, at 14-17, presents similar arguments with respect to the waiver of immunity from suit in federal court by state participation in the Food Stamp Program.

[29]See *Chesapeake Bay Bridge and Tunnel Dist. v. Lauritzen*, 404 F.2d 1001 (4th Cir. 1968), where the court held that the state's petition for permission to occupy the navigable waters pursuant to an act of Congress constituted a relinquishment of sovereign immunity and any Eleventh Amendment protection.

Townsend v. Swank, 404 U.S. 282 (1971).

Given this congressional scheme exacting state compliance with federal requirements as the quid pro quo for federal matching funds, this Court has already concluded that Congress intended beneficiaries of the categorical programs to have a federal claim against the state for non-compliance with federal law. *Rosado v. Wyman*, 397 U.S. 397, 420-22 (1970). In that case, this Court recognized that there was "not the slightest indication that Congress meant to deprive federal courts of their traditional jurisdiction to hear and decide federal questions in this field," and refused "to assume that Congress had closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program."[30] This interpretation of congressional intent is tantamount to a finding that Congress conditioned the participation of a state in the categorical assistance program on the forfeiture of immunity from suit in a federal forum. If Congress did not intend the suit in *Rosado* to be barred from federal court, Congress similarly did not intend this suit, identical in nature, to be barred from federal court. Both suits challenged state welfare practices and regulations as contrary to the Social Security Act. The fact that in this suit, the plaintiffs seek equitable restitution in addition to the relief secured in *Rosado* obviously has no bearing

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[30]These conclusions in *Rosado* answer petitioner's suggestion (Pet. Br. 17) that Congress intended an exclusive procedure and remedy in the form of cut-off of federal funds for failure to conform with the requirements of the Social Security Act. Also, it must be noted that the federal regulations governing the federal welfare programs expressly provide for federal financial participation in court-ordered retroactive welfare payments. 45 C.F.R. 205.10(b)(2)(3).

on the intent of Congress with respect to the suability of the state in federal court. Irrespective of the relief sought, the intent of Congress remains constant. The right of public assistance recipients to receive their federal entitlements is the heart of the AABD program, and a participating state has been fully aware, and certainly after *Rosado*, that suits to secure these federal entitlements are within the "traditional jurisdiction" of federal courts. Combining the decision in *Rosado* and the intent of Congress in enacting the AABD program, with the state's voluntary decision to participate in the AABD program, there can be little doubt that the petitioner has waived any immunity from suit in federal court he might otherwise have.

This conclusion is not inconsistent with this Court's holding in *Employees of the Dept. of Public Health and Welfare v. Dept. of Public Health and Welfare*, 411 U.S. 279 (1973). In that case, employees of certain state schools and hospitals sued their employer for double damages and attorneys fees for alleged violations of the overtime requirements under the Fair Labor Standards Act. This Court concluded that Congress in enacting the 1966 amendments to the Fair Labor Standards Act, adding FLSA coverage of certain state school and hospital employees, did not condition the continued operation by the State of Missouri of such institutions on the forfeiture of Eleventh Amendment immunity from suit in federal court.

In reaching this conclusion, the Court noted that the congressional scheme of enforcement under the FLSA empowered the Secretary of Labor to enforce through litigation private rights under the FLSA and to obtain restitution of unpaid wages for employees. In contrast, under the Social Security Act, Congress provided no mechanism for public enforcement, through litigation, of

the private rights, including restitution of benefits wrongfully denied, of welfare recipients. Moreover, the Court emphasized that "[i]t is one thing, as in *Parden* to make a state employee whole; it is quite another to let him recover double against a state." *Id.* at 283. Unlike the plaintiffs in *Employees*, the AABD recipients here are merely seeking relief to make them "whole." Relief requiring adherence to federal requirements and the payment of AABD benefits which should have been originally expended is certainly the kind of relief Illinois would expect on the basis of its voluntary participation in the AABD program, and, after the decision in *Rosado*, all doubts should have been put to rest that such claims could be brought in federal court. In contrast with *Employees* where the state continued to run its own institutions, albeit subject to the FLSA, in this case the state has entered into an arrangement of cooperative federalism in which the state is not operating exclusively on its own but is actually expending federal funds. The dramatic differences between the mere federal regulation of the payment of wages to state employees, and the entirely different congressional scheme of federal-state relations imposed under the Social Security Act, and the voluntary participation of the States in the latter, provide the grounds for the finding of constructive consent in this case and not in *Employees*.

III.

THE TIME STANDARDS FOR PROCESSING AABD APPLICATIONS EMBODIED IN HEW REGULATIONS ARE NEITHER AN UNREASONABLE INTERPRETATION OF NOR INCONSISTENT WITH THE "REASONABLE PROMPTNESS" REQUIREMENT OF THE SOCIAL SECURITY ACT.

Before reviewing equitable considerations, it is first necessary to dispose of the contention of the Director of the Illinois Department of Public Aid that the time standards in the federal regulations for processing AABD applications are arbitrary and inconsistent with the Social Security Act, 42 U.S.C. §1382(a)(8) (1969 ed.). This argument was not even presented to the trial court, and in accordance with the well-established rule, is thereby waived. *E.g., Tyrrell v. District of Columbia*, 243 U.S. 1 (1917)

Even if this court were to reach the merits of this contention, the issue is easily dismissed. The Social Security Act, 42 U.S.C. §1382(a) provides:

> "A state plan for aid to the aged, blind, or disabled and medical assistance for the aged, must . . .
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> * * *
>
> "(5) provide (A) such methods of administration . . . as are found by the secretary to be necessary for the proper and efficient operations of the plan,
>
> "(8) provide that all individuals wishing to make application for aid or assistance under the plan shall have opportunity to do so, and that such aid or assistance shall be furnished with reasonable promptness to all eligible individuals,[31]

[31]This section, added in 1962, Pub. L. 87-543, 76 Stat. 198, combined the identical provisions originally enacted in the Social Security Act Amendments of 1950, in the separate programs for the aged, blind, and disabled. Pub. L. 81-734, 64 Stat. 548, 553, and 555-6. *Cf., Jefferson v. Hackney*, 406 U.S. 535, 545 (1972).

"(13) include reasonable standards, consistent with the objectives of this subchapter for determining eligibility for and the extent of aid or assistance under the plan."

Pursuant to these congressional mandates, the Secretary of HEW exercised his rule making power under 42 U.S.C. §1302, and issued mandatory federal time standard regulations. Department of Health, Education and Welfare, Handbook of Public Assistance Administration, Part IV, Sections 2200(b)(3) and 2300(b)(5);[32] 45 C.F.R. §206.10(a)(3).[33]

These regulations, as noted in the Memorandum for the United States as Amicus Curiae in *Rodriguez v. Swank*, 403 U.S. 901 (1971), were drawn "on the experience of more than 17 years in administering the statute, as well as the experience and comments of various states and recipients." (Mem. at 7). As early as 1951, when the "reasonable promptness" provision became effective, the federal agency issued a directive (State Letter 167) requiring each state to specify a concrete standard of "reasonable promptness" for all but exceptional cases; if the standard exceeded 30 days for

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[32]"2200. Requirements for State Plans.

A State Plan for . . . AABD . . . must provide that:

(b)(3) prompt action will be taken on each application, within reasonable established time standards (which, effective July 1, 1968 will not exceed 30 days in AFDC, OAA, and AB, and as to age and blind in AABD, and 60 days in APTD and as to disabled in AABD) . . . .

* * *

"2300.

(b)(5) To assure the right to apply (IV-2200(b)): applicants are informed of the agency's time standard for promptness in action on applications (See IV-2200(b)(3) which is specified in agency policy, and that it covers the time from the date of application to the date the applicants are determined eligible and receive their first assistance check or notice of denial of assistance, . . ." (R 13)

[33]These regulations were effective February 27, 1971, 36 Fed. Reg. 3864.

aid to the aged and blind, and 60 days for aid to the disabled, the state was required to justify it and in addition, to develop plans to reach the predetermined standard by correcting practices which contributed to delay. (HEW, Handbook of Public Assistance Administration, IV-A, Sec. 2331, item 1, attached hereto as Exhibit A). After seventeen years experience with this standard and approach, HEW issued the regulations in question, with the modification, based on state comments, of the time standard for disabled applicants extended from 30 days to 60 days. (R Item 13). These regulations then were obviously not based on precipitous action, but were a carefully considered promulgation.

Indeed, Illinois adopted its own, albeit somewhat deficient, 30 day standard for aged and blind applicants, Section 4004.1, Illinois Categorical Assistance Manual, Illinois Department of Public Aid. Still, the Director of the Illinois Department of Public Aid now argues that the federal time standards are arbitrary and inconsistent with the "reasonable promptness" requirement of the act.

This contention must be rejected here, as it was, in connection with the AFDC program, in *Rodriguez v. Swank*, 403 U.S. 901 (1971), *aff'g* 318 F. Supp. 289 (N.D. Ill. 1970), and in *Like v. Carter*, 448 F.2d 798 (8th Cir. 1971) *cert. denied*, 405 U.S. 1045 (1972); *Worrell v. Sterrett*, (para. 10,575, C.C.H. Pov. Law Rpts., transfer binder) (N.D. Ind. 1969); *Lewis v. Riggins* (N.D. Ind. 1971) (attached to Plaintiff's Reply Brief, Item 56).

Clearly, under 42 U.S.C. §1302 and 1382(a)(5)(8) and (13) HEW has broad rule-making powers to interpret and implement the reasonable promptness provisions of the Social Security Act. This authority is recognized in *Lewis v. Martin*, 397 U.S. 552, 558 (1970).[34] Accordingly, it is

[34]See *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 277, n.28 (1969).

entirely appropriate for the Secretary to make the reasonable promptness requirement in the statute more definite by rule. The provisions in question draw on experience of more than 17 years of administering the program. Illinois, in fact, adopted time standards within the federal time standards. There is no merit in the contention that the federal regulations are arbitrary. As stated in *Lewis v. Martin*, 397 U.S. 552, 558:

"We give HEW the deference due the agency charged with administration of the act . . ."

A. The Defense of Prospective Application Only of District Court's Judgment Is Without Merit.

Defendant welfare officials also maintain that the non-retroactivity doctrine enunciated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), requires that the judgment below should be given only prospective application. (Pet. Br. at 37 incorporates by reference pp. 18-22 of the Petition for Certiorari on this point.) Because this question was not presented to the district court below prior to judgment, it is not properly before this Court. *Tyrrell v. District of Columbia*, 243 U.S. 1 (1917); *Jordan v. Weaver*, 472 F.2d at 995. Even if it were, the contention is wholly without merit.

In *Chevron* the plaintiff brought suit under the "Lands Act" (43 U.S.C. §1331 *et seq.*) to recover for personal injuries suffered while working on the defendant's artificial island drilling rig located on the Outer Continental Shelf off the Louisiana coast. At the time the lawsuit was filed, firm precedent interpreted the Act to make general admiralty law, including the equitable doctrine of laches, applicable. But before trial the Supreme Court decided *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), holding state law and not admiralty doctrines,

should be applied under the Lands Act. Relying on the new Supreme Court decision, the lower court held that the Louisiana one year statute of limitations governed, and not the admiralty law which would have permitted the action, and dismissed the case. The Supreme Court reversed. The Supreme Court held that the decision in *Rodrigue v. Aetna Casualty and Surety Co., supra,* establishing a new rule of law, should not be applied retroactively to a suit filed prior thereto, particularly in view of the fact that it would deprive plaintiff of any remedy.

Respondent welfare recipients submit that the *Chevron* doctrine is not applicable to this case. *See generally, Alexander v. Weaver,* 345 F. 666, 670-74 (N.D. Ill. 1972) vacated and remanded for entry of fresh judgment, 37 L.Ed.2d 141 (1973). The *Chevron* doctrine is applied to determine whether an earlier "decision [is] to be applied nonretroactively," 404 U.S. at 106. In this case there is no earlier decision, no counterpart to the *Rodrigue v. Aetna Casualty & Surety Co.*, case. Instead, the Director argues that the rule of the *Jordan* case, the instant case, "be applied nonretroactively" so as to deny to the plaintiffs before the court the relief to which the decision of their case establishes they are entitled. Defendant's attempted application of the *Chevron* doctrine to the facts of this case is wholly without merit.

Even if *Chevron* is considered applicable, defendant nevertheless fails to meet the three tests enunciated in the decision. The first test is:

> "The decision to be applied nonretroactively must establish a new principle of law either by overruling clear past precedent on which litigants may have relied, or by deciding an issue whose resolution was not clearly foreshadowed . . . ." 404 U.S. at 106.

In the instant case, no new rule of law was announced, as the Seventh Circuit recognized, 472 F.2d at 996; instead, the court merely enforced federal requirements which the defendant was well aware of. Cf., *United States v. Donnelly*, 397 U.S. 286 (1970). As to the second and third factors, whether the retrospective operation of the earlier decision will further the new rule, and will produce inequitable results, it is only by granting equitable restitution to the plaintiffs that purpose and effect will be given to the federal time standards, and that appropriate equitable relief will be given in this case.[35] (See Part IV *infra.*)

Defendant's argument is not advanced by reference to *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (referred to hereinafter as in the Petition, as Lemon II). Once again, the question presented was whether an earlier decision, *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (*Lemon* I), was to be applied nonretroactively. More specifically, in *Lemon* I the Court held that the Pennsylvania statutory program to reimburse nonpublic sectarian schools for certain secular educational services violated the Establishment Clause of the First Amendment. In the first case plaintiffs abandoned their attempt to enjoin contracts or the payment of state funds under the state statutory program for the first year, and similarly did not seek to enjoin contracts or payments for the second year or third year. Only after the decision in *Lemon* I, on remand, did

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[35] "Thus the 'purpose of the new rule' test is not really applicable here since there is no 'new' rule, only the revelation of an old one, and even if purpose was a consideration, that purpose would have to be assessed as of the time of its applicability absent the invalid regulation and not as of today." *Alexander v. Weaver*, 345 F. Supp. at 673 (N.D. Ill. 1972).

they seek to prevent the reimbursement by the state for services already provided by the schools under contracts for the third year, all of which services were provided prior to the decision in *Lemon* I. Under these circumstances, the Court affirmed the decision of the lower court which permitted Pennsylvania to reimburse the schools for services performed prior to *Lemon* I, but enjoined any payments under the program for services rendered after *Lemon* I. *Lemon* II, 411 U.S. 192 (1973).

Unlike *Lemon* II, in this case the plaintiffs, *ab initio*, have sought the challenged relief in *Jordan* I; there is no *Jordan* II. Moreover, the defendants in this case knew that "substantial numbers of eligible AABD applicants were being deprived, contrary to the requirements of federal law, of their full AABD entitlements effective thirty days from the date of their application . . . ." (App. 87)

IV.

GRANTING EQUITABLE RESTITUTION TO MEMBERS OF THE PLAINTIFF CLASS WAS WITHIN THE EQUITABLE POWERS OF THE COURT.

In the trial court the Director of Public Aid argued that restitution of benefits wrongfully denied should not have been granted "back any further than the date this lawsuit was filed." (App. 107) This contention was abandoned in the court of appeals and also, necessarily, in this Court. Instead, the Director of Public Aid, while in effect conceding that all members of the plaintiff class were unlawfully denied AABD benefits to which they were entitled, now contends that no restitution whatsoever is proper (a) because of the Eleventh Amendment, (b) because of the nonretroactivity doctrine enunciated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), and (c)

because neither the Social Security Act nor 42 U.S.C. §1983 authorizes restitution of benefits wrongfully denied. In this part, respondent AABD recipients will review the bases for the Court's authority under the Social Security Act and under 42 U.S.C. §1983 to grant restitution, and the reasons why equitable restitution furthers the congressional purposes embodied in the Social Security Act and is a proper remedy to effectuate compliance with the Act.

A. The Trial Court in the Exercise of Its Traditional Equitable Powers and in Furtherance of the Purposes of the Social Security Act Had the Authority To Require Restitution of AABD Benefits Wrongfully Denied.

Petitioner claims that "there is no language, express or implied, in the Social Security Act which grants welfare recipients the right to retroactive benefits." (Pet. Br. 17) This contention reveals a misunderstanding of the court's power as a court of equity to fashion appropriate remedies to further the purposes of the Social Security Act. The issue is not whether there is "a right to retroactive assistance" (Pet. Br. 24), whatever the word "retroactive" means in that context. There is an unquestioned right to benefits. In *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970), the Court stated: "Such benefits are a matter of statutory entitlement for persons qualified to receive them." And this Court has repeatedly recognized that "the existence of a statutory right implies the existence of all necessary and appropriate remedies," *Sullivan v. Little Hunting Park*, 396 U.S. 229, 239 (1969), and that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purposes," *J.I. Case v. Borak*, 377 U.S. 426, 433 (1963). As recently stated:

"Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenberg Bd. of Education*, 402 U.S. 1, 15 (1971).

Thus the question is whether the maxim *ubi jus ibi remedium* will be fulfilled.

Respondent AABD recipients maintain that it was not unreasonable for the lower court, exercising its traditional equitable powers, to conclude that a restitution order was appropriate and necessary to enforce compliance with the Social Security Act, to give effect to its purposes, and to provide a remedy for the violation of law. *Porter v. Warner Holding Co.*, 328 U.S. 295 (1946); *Mitchell v. DeMario Jewelry*, 361 U.S. 288 (1960).

Porter v. Warner Holding Co., 328 U.S. 395 (1946), concerned the equitable power of a federal court to order restitution of rents collected by a landlord in excess of the maximums permissible under the Emergency Price Control Act. The courts below had held that there was no authority under the statute to order restitution. In reversing, the Court enunciated the principles supportive of the lower court decisions in this case.

"Unless otherwise provided by statute, all the inherent equitable powers of the District Courts are available for the proper and complete exercise of that jurisdiction. . . . Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing

complete justice, should not be yielded to light inferences, or doubtful construction.' " *Id.* at 398.

Recognizing, then, the authority of a federal court to grant equitable restitution, the Court examined the function of a restitution order in the context of the purposes of the Emergency Price Control Act. For reasons wholly applicable to the instant case, the Court upheld a restitution order on two theories:

"(1) It may be considered as an equitable adjunct to an injunction decree. Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief . . . [W]here as here, the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief . . ."

"(2) It may be considered as an order appropriate and necessary to enforce compliance with the Act . . . . The inherent equitable jurisdiction which is thus called into play clearly authorizes a court, in its discretion, to decree restitution of excessive charges in order to give effect to the policy of Congress. And it is not unreasonable for a court to conclude that such a restitution order is appropriate and necessary to enforce compliance with the Act and to give effect to its purposes. Future compliance may be more definitely assured if one is compelled to restore one's illegal gains." *Id.* at 399-400 (citations omitted).

In *Mitchell v. DeMario Jewelry*, 361 U.S. 288 (1960), this Court made clear that the *Porter* decision did not

stand for the proposition that the authority to grant equitable restitution rested on an express or implied congressional enactment, the very proposition offered here by the petitioner. In *Mitchell* the Court was confronted with the question whether the federal court had the authority to order restitution of lost wages to an employee discharged in violation of the Fair Labor Standards Act. Relying on the principles announced in *Porter v. Warner Holding Co., supra,* the Court reiterated the basic tenet that a court of equity has the power to provde "complete relief in light of the statutory purposes." *Mitchell v. DeMario Jewelry,* 361 U.S. at 291-92. Analyzing, then, the purposes of the Act and the provisions of the Act barring retaliation against employees reporting violations thereof, this Court concluded again, as in *Porter*, that equitable restitution was consistent with the purposes of the Act and indeed that there was "doubtless little room for the exercise of discretion not to order reimbursement . . ." *Id.* at 296.

The authority of the federal court here to grant equitable restitution of AABD benefits unlawfully denied is squarely within the principles established in *Porter* and *Mitchell.* There are no provisions in Title XVI of the Social Security Act, 42 U.S.C. §1381 *et seq.* (1969 ed.) which in any way restrict the federal court's traditional comprehensive equity powers to give "complete rather than truncated justice." *Porter, supra,* 328 U.S. at 398. In the absence of any such statutory restriction on the court's equitable powers, "the full scope of that jurisdiction is to be recognized and applied." *Id.*

In *Rosado v. Wyman,* 397 U.S. 397 (1970), a case involving the AFDC program, this Court has already rejected the argument (Pet. Br. 17) that the grant of authority under the Social Security Act to HEW to cut off federal funds for noncompliance with statutory

requirements provides the exclusive procedure and remedy for violations of the Act. *Rosado v. Wyman*, 397 U.S. at 405-407, 420-423. While the issue was decided there in the context of New York's argument that primary jurisdiction existed in the Department of Health, Education and Welfare over challenges to state welfare provisions as violative of the provisions of the Social Security Act, the Court's reasoning fully supports the federal court's authority to grant equitable restitution here. In both situations, there is not the slightest indication that Congress "closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program,"[36] (*Id.* at 420) or "that Congress meant to deprive federal courts of their traditional jurisdiction to hear and decide federal questions in this field." (*Id.* at 422)

In *Rosado*, the plaintiff AFDC recipients had sought to enjoin, as contrary to Section 402(a)(23) of the Social Security Act, the implementation of a wholly new plan for calculating the standard of need and level of payments to AFDC families. The plan was placed into effect, after the Court refused to stay the appellate court decision reversing the trial court, and, as a result AFDC benefits under the new plan had been reduced almost

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[36]Contrary to petitioner's representation (Pet. Br. 19), H.R. 16311, 91st Cong., 2d Sess. C.169-170 (Comm. Print. Nov. 5, 1970, Senate Comm. on Finance) did not purport to give a "right of retroactive assistance to welfare recipients," but instead would have given HEW the authority to require retroactive payments to eligible persons denied such benefits. Because this provision did not pass, and HEW has no such authority, there is even stronger grounds than in *Rosado* to conclude that Congress has not "closed the avenue of effective judicial review to those individuals most directly affected . . ." *Id.* at 420.

forty million dollars. *Rosado, supra* at 416-17. After deciding that the New York new plan did violate the requirements of 402(a)(23) of the Social Security Act, the Court then addressed the question of the proper relief. *Rosado, supra* at 420-423.

In view of the fact that New York had already implemented its drastic revision of the entire AFDC program, and that the Court had declared such revision to be contrary to federal law, the Court fashioned the only appropriate remedy under the circumstances–an injunction against the payment of federal monies according to the revised plan, should the state not develop a conforming plan within a reasonable period of time. As presented to the Court, there was no prayer for equitable restitution, and accordingly, the Court did not consider the propriety of such a remedy.[37] Certainly there is nothing in the opinion to support the conclusion "that there are both constitutional and federal statutory bars to retroactive awards being granted to welfare recipients." (Pet. Br. 17-20)

On the contrary, the numerous later affirmances by this Court of decrees granting equitable restitution of benefits wrongfully denied[38] support the conclusion that the federal courts may exercise their inherent equitable powers in fashioning appropriate equitable remedies, including restitution, to enforce compliance with the Social Security Act and to give effect to its purposes.

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[37]On remand, the plaintiffs sought retroactive benefits, but such relief was held to be barred by the mandate of the Supreme Court. *Rosado v. Wyman*, 322 F.Supp. 1173, 1195-96 (E.D. N.Y. 1970). No appeal was taken on this aspect of the decision.

[38]*State Department of Health and Rehabilitative Services v. Zarate*, 407 U.S. 918 (1972) *aff'g* 347 F. Supp. 1004 (M.D. Fla. 1971); *Sterrett v. Mothers and Children's Rights Organization*, 409 U.S. 809 (1972); *Weaver v. Doe*, 404 U.S. 987 (1971) *aff'g* 332 F. Supp. 61 (N.D. Ill. 1971).

Such equitable discretion is wholly parallel to that exercised by the federal courts under the Emergency Price Control Act (*Porter v. Warner Holding Co.*, 328 U.S. 395 (1946)), and under the Fair Labor Standards Act (*Mitchell v. DeMario Jewelry*, 361 U.S. 288 (1960)).

B. Granting Equitable Restitution to Members of the Plaintiff Class Was Appropriate and Necessary to "Redress" the Deprivation of Federal Rights Pursuant to the Congressional Mandate in Section 1983.

Supplemental to the court's traditional equitable powers, the lower court here was acting pursuant to the congressional mandate in 42 U.S.C. §1983 which refers to a proceeding for "redress" of the deprivation of federal rights. In *Mitchum v. Foster*, 407 U.S. 225, 239, 242 (1972), the Court stated:[39]

> "Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation."
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> * * * * *
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> "The very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights . . ."

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[39]In *Mitchum v. Foster, supra* at 239 n.30 (1972), a representative is quoted who described his perception of the problem to which the predecessor to 1983 was adopted in terms that are quite descriptive of the facts of this case.

> " 'The principle [sic] danger that menaces us today is from the effort within the States to deprive considerable numbers of persons of the civil and equal rights which the General Government is endeavoring to secure to them.' "

In *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972), this Court held that Section 1983 and its jurisdictional counterpart, Section 1343(3), were enacted to provide sweeping protection to basic civil rights, rejecting any distinction between personal and property rights. Further, the Court noted that by these sections Congress "intended to provide a federal judicial forum for the *redress* of wrongful deprivations of property by persons acting under color of state law." *Id.* at 543 (Emphasis added.) Specific reference was made to the Court's use of these sections in welfare cases (*Id.* at 551 n.19 and 20). The Court also stated that "[t]he right to enjoy property without unlawful deprivation . . . is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account." *Id.* at 552. Applying these principles to the instant case, "redress" of the deprivation of federal rights of John Jordan and other members of the plaintiff class could only be secured by equitable restitution of the AABD benefits wrongfully denied. Such relief would appear to fall within the broad protection originally contemplated by the Congress in enacting the predecessor to Section 1983. *See generally, Monroe v. Pape,* 365 U.S. 167 (1961).[40] In public assistance cases proper redress against state officials often requires equitable restitution; in school desegregation cases other equitable

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[40]In *Monroe v. Pape, supra,* at 196-97 (concurring opinion), one Senator, in discussing the predecessor to 1983, is quoted:

" 'As to the civil remedies . . . the injured party should have an original action in our Federal courts, so that by *injunction* or by the recovery of damages he could have relief against the party who under color of such law is guilty of infringing his rights.' " (Emphasis supplied.)

remedies are appropriate; in the reapportionment cases, still other equitable remedies are adopted; and in cases involving inadequate jail and mental health facilities, other extensive equitable remedies have been fashioned against state officers pursuant to Section 1983. (See cases cited *supra* at 32) In all these cases, the courts are fulfilling the mandate of 1983, that is, to "redress" the deprivation of federal rights.

C. The Remedy of Equitable Restitution Is Necessary To Effectuate Compliance With the Social Security Act.

The AABD program involved in this case is one of the public assistance programs that reflects "a scheme of cooperative federalism." *King v. Smith*, 392 U.S. 309, 316 (1968). Illinois has chosen to participate in the AABD program, and has thereby accepted the concomitant responsibilities and obligations to conform to the requirements of the Social Security Act and the mandatory rules and regulations promulgated by HEW, such as those involved in this case. *Id.* Congress established an equation whereby the federal government provided substantial financial assistance to the states for the provisions of financial assistance to needy, aged, blind, and disabled persons in exchange for the state's adherence to the conditions and requirements set down by Congress and HEW. Petitioner here was fully aware of this bargain, chose to breach its obligation to members of the plaintiff class, and now seeks to benefit from his own wrong and to avoid financial accountability to the plaintiffs for AABD benefits wrongfully withheld. Respondent public aid recipients submit that if the remedy of restitution is not available under the circumstances of this case, state welfare officials across the country will be encouraged to

flaunt paramount federal law, as was done by the former director of public aid in this case. Only by upholding the remedy of restitution will the necessary incentives to comply with the mandates of federal law be established.[41]

Recognizing the remedy of equitable restitution as a means of effectuating compliance with a particular Act of Congress is found in other areas of the law as well. As discussed *supra* at 53-54, in *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), restitution of excess rents paid in violation of the Emergency Price Control Act was "considered as an order appropriate and necessary to enforce compliance with the Act." *Id.* at 400. "Future compliance may be more definitely assured if one is compelled to restore one's illegal gains . . ."[42] *Id.*

In *Mitchell v. DeMario Jewelry*, 361 U.S. 288, 292-93 (1960), the Court also recognized restitutionary relief as a means of effectuating compliance with the Fair Labor

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[41]The Solicitor General, in his petition for certiorari in *Butz v. Carter*, No. 73-546 at 14, involving violations of The Food Stamp Act, similarly argues that the "[l]ack of an appropriate judicial remedy to enforce State responsibility will only encourage additional State laxity."

[42]The Court also noted that

> "the statutory policy of preventing inflation is plainly advanced if prices of rents which have been collected in the past are reduced to their legal maximums." *Porter v. Warner Holding Co.*, 328 U.S. at 400.

This decision was rendered in 1946, while the excess rents were paid in 1942 and 1943. In the same way, payments of AABD benefits now to the plaintiffs will serve the policy of aiding the needy, even though the original payments should have been made a few years ago.

Standards Act in cases involving retaliatory discharges. Similarly, in other FLSA suits, restitutionary injunctions to restrain the withholding of unpaid minimum wages or overtime compensation, are granted to deter violations thereof (*Hodgson v. Taylor*, 439 F.2d 288 (8th Cir. 1971), and to deprive violators of any gains accruing as a result of their violations. *Wirtz v. Wershow Co.*, 416 F.2d 1071 (9th Cir. 1969); *Wirtz v. Malthor, Inc.*, 391 F.2d 1 (9th Cir. 1968).

These same policy considerations apply with equal validity to enforcing compliance with the Social Security Act. First, equitable restitution eliminates any possibility of financial savings to a state welfare department as a result of the knowing disregard of federal requirements. Certainly, a state public aid official should not be permitted to profit from his own wrong.[43] Otherwise,

> "state welfare officials could withhold benefits in violations of federal law until suit is brought and a

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[43] "A person who has been unjustly enriched at the expense of another is required to make restitution to the other."

* * *

"A person is not permitted to profit by his own wrong at the expense of another." Restatement of the Law of Restitution, American Law Institute, Ch. 1, Sections 1 and 3 (1958 reprint of 1937 ed.)

In *Samuel v. University of Pittsburgh*, 56 F.R.D. 435, 440 (W.D. Pa. 1972), involving the constitutionality of a rule defining nonresidents for purposes of tuition, the court recognized that "if restitution were not available to the class the defendant would be unjustly enriched . . ."

court acts, and retain the illegal savings acquired theretofore."[44] *Jordan v. Weaver*, 472 F.2d at 992.

Second, the availability of the remedy of restitution creates both the incentive and the necessity on the part of state welfare officials for careful attention to, and compliance with, paramount federal law when adopting and enforcing state rules and regulations.[45] The notorious laxity of state welfare officials in this area is documented by the numerous cases voiding state welfare provisions clearly in violation of federal law, and the necessity oftentimes to institute repeated litigation to enforce the same provision of the Social Security Act.

For example, in *Lawson v. Brown*, 349 F. Supp. 203 (W.D. Va. 1972), the court invalidated the obviously illegal state provision denying AFDC to needy families with sixteen and seventeen year olds who were not in school. However, the Virginia Department of Public Aid continued to adhere to its illegal policy in disregard of federal law. In *Frye v. Lukehard*, 361 F. Supp. 60 (W.D. Va. 1973), the policy was again challenged, and this time

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[44]Similarly, in *Alvarado v. Schmidt*, 317 F. Supp. 1027, 1042 (W.D. Wis. 1970), the court observed that

> "to deny AFDC recipients payments to which they are legally entitled and which the state wrongfully withheld would be to allow a state to operate the AFDC plan that violated federal statutory requirements with financial impunity."

To the same effect, *Alexander v. Weaver*, 345 F. Supp. 666, 673 (N.D. Ill. 1973); *Schaak v. Schmidt*, 344 F. Supp. 99 (E.D. Wis. 1971).

[45]In asking for statutory authority to require states to restore benefits wrongfully denied, HEW has recognized such a remedy to be a means of obtaining compliance with the requirements under the Social Security Act. H. Rep. No. 231, 92d Cong., 1st Sess., pp. 205-206.

the court granted restitution to members of the plaintiff class. Similarly, in *Story v. Roberts*, 352 F. Supp. 473 (M.D. Fla. 1972), the Florida welfare department continued to apply a state regulation requiring AFDC applicants, as a precondition to eligibility, to prosecute a civil action for support of their children. This type of state requirement had already been clearly held to be contrary to the Social Security Act in *Meyers v. Juras*, 327 F. Supp. 659 (D. Ore. 1971), *aff'd* 404 U.S. 803 (1971), *reh. denied* 404 U.S. 961 (1971); *Taylor v. Martin*, 330 F. Supp. 85 (N.D. Cal. 1971) *aff'd* 404 U.S. 980 (1971); *Doe v. Swank* 332 F. Supp. 61 (N.D. Ill. 1971), *aff'd sub nom. Doe v. Weaver*, 404 U.S. 987 (1971), and was contrary to federal regulations, yet Florida persisted, as in this case, in disregarding federal law. Under these circumstances, the court concluded that federal interests under the Social Security Act would be served by requiring restitution of all public assistance benefits wrongfully denied.

Yet another example is *Silvey v. Roberts*, ___ F. Supp. ___ (M.D. Fla. Aug. 3, 1973) in which the court invalidated the defendant welfare department's policy of not granting notice and a hearing prior to termination and reduction of excess medicine grants. The court explained why restitution was in furtherance of congressional purposes.

> "First of all, the defendants' policy . . . was a patent violation of the 'fair hearings' regulation which was published on February 13, 1971 and which went into effect as of April 14, 1971. The defendants were at least grossly negligent in not complying therewith. Granting retroactive benefits will serve to deter the defendants from engaging in similar violations in the future. The second congressional interest, that of promoting the federal policy of

> satisfying the needs of impoverished persons, will be fulfilled since only those members of the class who were forced to incur expenses for payment of needed medicine will be granted retroactive payments. Third, the congressional interest of insuring that federal funds are used properly is obviously satisfied since they were wrongfully withheld in the first place . . . The equities of the situation dictate that retroactive payments are appropriate in this particular case . . . . Since the HEW 'fair hearing' regulations went into effect on April 14, 1971, the defendants are directed to provide benefits retroactive to that date." Slip op. at 11-12.

In short, only by granting restitution does it become crystal clear that paramount federal law must be strictly observed, and that violations thereof will be counterproductive for the state.

On the other hand, if the remedy of restitution is not available, public welfare officials will learn the valuable lesson that federal law can at all times be violated and disregarded with impunity, and substantial cost savings in state welfare budgets can be achieved by ignoring federal laws. This is hardly a precedent to effectuate compliance with the Social Security Act and regulations thereunder. In other words, adherence to the federal requirements under the Social Security Act is promoted only if this Court clearly announces that restitution of benefits wrongfully denied is an available remedy for violations of federal law. Otherwise, the force of federal law in this area is seriously undermined. Certainly, neither the unlikely possibility of a statutory cut-off of federal funds nor the possibility of prospective injunctive relief serves as a meaningful deterrent to state violations of federal law. For this reason it is clear that only the availability of a restitutionary remedy will serve to foster and encourage

strict compliance with federal requirements, and to deter violations thereof, whether such violations be deliberate, as in this case, or otherwise.

In conclusion, respondent public assistance recipients submit that if this Court holds that restitution is precluded by the Social Security Act or some other bar, there will continue to be flagrant and widespread violations of the Social Security Act, and the paramount congressional interest in providing assistance to needy eligible persons will be substantially undermined. On the other hand, by affirming the power of a court of equity to fashion effective remedies, including equitable restitution to redress the deprivation of federal rights, this Court will create the essential incentives for state welfare officials to comply with federal requirements under the Social Security Act.

D. The Seventh Circuit Did Not Err in Upholding the Decree Requiring Equitable Restitution to Members of the Plaintiff Class Under the Circumstances of This Case.

In this case federal law concededly required AABD applications to be processed within maximum time standards, and, in those cases where they were not, eligible AABD applicants, such as the members of the plaintiff class, were to be furnished assistance as of the last day of the maximum permissible time period. The former Director of the Illinois Department of Public Aid was aware of these requirements. (App. 85-89) Yet he chose to ignore them beginning July 1, 1968, and persisted in this violation up to and even after the federal provisions were upheld and the Illinois provisions in contravention of federal law were held void in *Rodriguez v. Swank,* 218 F. Supp. 289 (N.D. Ill. 1970) (order at

App. 22-29). These facts in support of the decree of equitable restitution are far more compelling than those presented in other public assistance decisions granting restitution which this Court previously affirmed. *State Department of Health and Rehabilitative Services v. Zarate*, 407 U.S. 918 (1972), *aff'g* 347 F. Supp. 1004 (D. Fla. 1971); *Sterrett v. Mothers and Children's Rights Organization*, 409 U.S. 809 (1972), *aff'g* unreported judgment (N.D. Ind. 1972); *Doe v. Weaver*, 404 U.S. 987 (1971), *aff'g* 332 F. Supp. 61 (N.D. Ill. 1970); *Gaddis v. Wyman*, 304 F. Supp. 717 (S.D. N.Y. 1968) (order at par. 10,506 Transfer Binder, CCH Pov. Law Rptr.), *aff'd per curiam sub nom. Wyman v. Bowens*, 397 U.S. 49 (1969).

Moreover, this case presents a clear example of state official disregard for the supremacy of federal law. In contrast to *Rothstein v. Wyman*, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973), the federal interest in deterring this kind of disregard of federal law, standing alone, is sufficient to justify the restitution provisions of the decree.[46] As is discussed at length in the

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[46]In *Rothstein, supra*, the plaintiffs challenged the geographical differential in amount of aid payments between the City of New York and the seven-county area adjoining it. After a preliminary order (303 F. Supp. 339), the Commissioner of Welfare raised benefits for public assistance recipients in the seven-county area. After this decision was appealed to the Supreme Court and vacated and remanded on other grounds, *Wyman v. Rothstein*, 398 U.S. 275 (1970), the case was again heard on the merits and decided in favor of the plaintiffs. *Rothstein v. Wyman*, 336 F. Supp. 328 (S.D. N.Y. 1970). Only after this decision did plaintiffs first seek restitution, and a year later such relief was granted. (Unreported opinion) The Second Circuit, in *Rothstein v. Wyman*, 467 F.2d 226 (2d Cir. 1967) rejected this relief for the reason that under the circumstances of the case such relief did not assist the effectuation

previous section, by upholding the decree of equitable restitution in this case the Seventh Circuit has established a meaningful deterrent to violations of the requirements under the Social Security Act. On the other hand, if the restitution provisions in this case were not upheld, the petitioner would then derive a financial benefit from the violation of federal law. In this case, in particular, in view of the earlier litigation in *Rodriguez*, this consequence is unacceptable. Certainly it is appropriate for a court of equity to eradicate the financial savings accruing from violating the law.

In addition, the Seventh Circuit's affirmance of the restitution provisions, is wholly justified insofar as a court of equity must weigh the equities as between the parties. On this balancing scale, all of the equities support the plaintiffs-respondents. They are needy aged, blind, and disabled persons who were entitled to financial assistance for the basic necessities of life, and who were

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of federal welfare policies. The Second Circuit stressed that there was no showing that the state welfare commissioner knew that his actions were in violation of federal law and no showing of a lengthy course of unlawful conduct. This is in contrast to this case where the director of the Department of Public Aid was fully aware of the illegality of his regulations and persisted in enforcing them for almost three years. (App. 85-89) As a result of this major difference, the court in *Rothstein* did not view the congressional interest in deterring violations of the Act to be furthered by restitutionary relief; on the other hand, the Seventh Circuit in *Jordan*, recognized the clear deterrent effect of the restitutionary remedy in this case and the necessity therefor. Moreover, in *Rothstein* in the absence of any evidence of knowing denial of benefits, the court did not think the equities, as between the parties, was conclusive. While respondents do not necessarily concur in that weighing of the equities, in this case, in view of the knowing illegal denial of benefits, the equities are overwhelmingly on the side of the respondents in support of restitution.

knowingly denied such benefits in contravention of federal law. On the other hand, the state welfare director knew that federal law was binding, that it was being violated, and that the consequences of the violation were to deprive plaintiffs of their federal entitlement. His hands were indeed far from clean.[47] Indeed, the equities are so overwhelmingly in favor of the AABD recipients in this case that the defendants abandoned on appeal all arguments based on the equities and instead have only interposed technical defenses that would bar any and all restitution. Certainly, the Seventh Circuit in this case, in affirming the judgment below, did not err, as a matter of law.

An instructive analogy in weighing the equities is found in the cases involving the unlawful withholding of unpaid minimum wages or overtime compensation. In such cases, as in public assistance cases, there is an unquestioned right to receive, in the first instance, certain monies, but such sums are unlawfully withheld. In these FLSA cases, the courts have concluded the equities tip significantly in favor of equitable restitution to the employees of monies unlawfully withheld. *Schultz v. Mistletoe Express Service, Inc.*, 434 F.2d 1267 (10th Cir. 1970); *Schultz v. Parke*, 413 F.2d 1364 (5th Cir. 1969). In comparison, *a fortiori*, the equities are in favor of granting equitable restitution of statutory entitlements to the needy aged, blind, and disabled vis-a-vis the errant department of public aid.[48] As concluded in *Mitchell v. DeMario Jewelry*, 361 U.S. 288, 296 (1960), there would

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[47]See footnote 43, *supra* p. 62.

[48]To the extent that the withholding by employers of minimum wages and overtime pay in violation of the Fair Labor Standards Act is deemed to be a "continuing public offense," (*e.g. Wirtz v. Malthor, Inc.*, 391 F.2d 1 (9th Cir. 1968), and recovery of such monies is a vindication of a public right, the withholding of AABD

seem to be "doubtless little room for the exercise of discretion not to order reimbursement . . ."

Finally, respondent AABD recipients would emphasize to the Court that the receipt of AABD benefits *nunc pro tunc* by members of the plaintiff class will fulfill the paramount congressional goal of providing subsistence payments to the needy aged, blind, and disabled. Because of the inadequate amount of the grant, basic needs are often unmet even when the full amount of the grant is timely received. (John Jordan's allowance for food was $26.56 per month, and $6.38 for clothing. [R. Item 46, F-40]) Restitution to John Jordan, and others, will merely give them assistance to pay off debts or to purchase needed major items, such as clothes, the money for which is supposed to be saved somehow over a number of years. (See Exhibit B, attached hereto, Monthly Budget Chart/Budgeted Clothing Items.) To persons living on welfare grants, restitution of benefits wrongfully denied is not a windfall, but merely a possible means to meet current needs, long postponed. The interests of federalism inherent in the AABD program require, at a minimum, that participating states furnish assistance in accord with federal requirements. As the Seventh Circuit stated:

> "Since the State of Illinois obligated itself to follow federal law in disbursing welfare assistance, it cannot cogently complain that having to make those payments now, which federal law required it to make in

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benefits from needy aged, blind, and disabled persons should be viewed as a "continuing public offense," the vindication of which is a public right. This Court has recognized that the providing of financial assistance to the needy to secure the basic necessities of life is part of the "Nation's basic commitment" under our Constitution. *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970).

> the first place, will wreak fiscal disruption. In accepting the federal assistance program, the state must have calculated the cost of compliance."[49] 472 F.2d at 993.

In summary, then, the decision of the Seventh Circuit, in upholding the restitution provisions of the court below, properly concluded that such relief would assist in effectuating compliance with the federal requirements under the Social Security Act, and would further the paramount congressional purpose of furnishing needy elderly, disabled, and blind persons with their statutory entitlements. Further, the Court properly concluded that such relief was warranted on the basis of the equities between the parties.

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[49]This quote fully answers petitioner's argument that the relief here will interfere with state budgetary processes. (Pet. Br. 35-37) The spectre of "bankruptcy of the State, or the exhaustion of available revenues" is wholly without foundation in the record. Just as the payment of restitution in *Rodriguez* did not present a problem, none will be presented if the decree below is affirmed.

CONCLUSION

For all the foregoing reasons, respondents respectfully request this Court to affirm the judgment of the court below.

Respectfully submitted,

SHELDON ROODMAN
KENNETH K. HOWELL
Legal Assistance Foundation
of Chicago
64 East Jackson Boulevard
Chicago, Illinois 60604
Telephone: 922-5625

Attorneys for Respondents

Of Counsel:

MARILYN KAPLAN KATZ
Bridgeport Legal Services
412 East Main
Bridgeport, Connecticut 06608

DATE: October 19, 1973

EXHIBIT "A"

A-2331

Handbook of Public Assistance Administration

(Additional Provisions Relating to the 1950 Amendments to the Social Security Act)

Part IV.	Eligibility and Payments to Individuals	
A-2000-2999	Eligibility	11/14/51

A-2331. Requirements

State plans must

1. Specify a time period to serve as a standard of reasonable promptness for completing the application process in all but exceptional cases. If the period established as the standard of promptness for application for old-age assistance, aid to the blind, and aid to dependent children is longer than 30 days, and for aid to the permanently and totally disabled longer than 60 days, the submittal must be accompanied by (a) a statement justifying the necessity for the longer period, and (b) a statement as to the action the State proposes to take to remedy any hindering conditions, and when it will put such action into effect.

2. Provide for informing claimants (a) of the agency's standard of promptness so that each may know the time period within which he should expect action on his claim, and (b) of his right to request a hearing on the basis of the promptness requirement if action is not taken within the specified period to furnish assistance or notify him of his ineligibility.

EXHIBIT "B"

Illinois Department of Public Aid

MONTHLY BUDGET CHART

The Allowances in Sections I and II are to be used for active persons; those in Section III are for bedfast adults. See Section V for adults in group care.

I. AABD	Number of Persons in Household	Total Personal Allowance	Food	Clothing	Household Supplies	Personal Essentials
Adult	1	$49.03	$30.38	$ 6.88	$2.01	$9.76
	2	44.95	27.85	6.88	1.60	8.62
	3 thru 7	42.17	25.32	6.88	1.35	8.62
	8 or more	41.54	24.89	6.88	1.15	8.62

AABD (B)–For blind minors under 18, use children's allowances in Section II for food, clothing, and personal essentials.

II. ADC						
Adult	2	44.71	29.75	7.50	1.60	5.86
	3 thru 7	41.74	27.03	7.50	1.35	5.86
	8 or more	39.56	26.57	7.26	1.15	4.58

* * *

III. BEDFAST						
Adult	2	34.54	25.85	3.34	1.60	3.75
	3 thru 7	31.92	23.48	3.34	1.35	3.75
	8 or more	31.37	23.13	3.34	1.15	3.75

IV. DIET ALLOWANCE FOR NORMAL PREGNANCY

Family of 2 – $4.38 – Family of 3 or more - $3.98

* * *

V. GROUP CARE–Clothing and Personal Essentials Allowances for Recipients in Private and County Nursing Homes, Sheltered Care Homes, Homes for the Aged:

	Adults	
	Active	Bedfast
Clothing	$5.64	$3.72
Personal Essentials	2.79	2.79
	$8.43	$6.51

Revised 9-1-72

EXHIBIT "B-1"
APPROXIMATE YEARLY CLOTHING ITEMS FOR EACH AGE GROUP IN THE FAMILY

Item	1-5 Yrs.	6-12 Yrs.	13-20 Yrs.	ADC Adult	AABD Adult
OUTER GARMENTS					
Winter Coats	1/2	1/2	1/2	1/5	1/6
Everyday Outfits	3	3	3	2	2
Spec. Outfits	2	1	1	1-1/2	1
Sweaters	1/2	1	1/2	1/4	1/3
UNDERGARMENTS					
Underwear	7	3	3	1	2-1/2
Nightclothes	2	1-1/3	1-1/3	1-1/4	1
FOOTWEAR					
Shoes - Oxfords	3	2	2	2	1
Gym	1	3	3	House-shoes 1/6	House-shoes 2
Hose	8	8	8	7	7
Overshoes	1/2	1/2	1/2	1/3	1/4
ACCESSORIES					
Mittens or gloves, belt, ties, handkerchiefs, head covering	$1.91	$3.94	$6.67	$6.12	$5.38
MISCELLANEOUS					
Clothing Care and Upkeep	–	$1.44	$4.56	$7.90	$7.40

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1410

JOEL EDELMAN, DIRECTOR OF ILLINOIS DEPARTMENT OF PUBLIC AID, et al.,

Petitioners,

v.

JOHN JORDAN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF ON THE MERITS

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street, Suite 900,
Chicago, Illinois 60601, 312-793-3500,
Attorney for Petitioners.

DONALD S. CARNOW,
Special Assistant Attorney General,
Of Counsel.

Printed by Authority of the State of Illinois

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF ON THE MERITS

SUMMARY OF ARGUMENT

The monetary award made by the District Court is wrongfully characterized by Respondents as "equitable restitution". The award is in the nature of a statutory entitlement barred by the Eleventh Amendment. It is elementary that unjust enrichment is a prerequisite for a finding of restitution. Unjust enrichment is not present in this case.

Illinois did not waive its Eleventh Amendments rights of immunity from suit either expressly or impliedly by its participation in the welfare assistance program. Nor did Illinois waive such rights, as the Illinois Attorney General had no power to waive the State's right to Eleventh Amendment protection.

Respondents' rights arise not under Title 42 U.S.C. 1983, but under the Social Security Act. That act did not create an express or implied right to retroactive assistance, nor does it require a waiver of the Eleventh Amendment prohibition.

Respondents present no case in which statutory rights have taken precedence over Eleventh Amendment rights absent an express or implied waiver. Citation of cases in which constitutional guarantees have taken precedence over Eleventh Amendment rights are beside the point. The financial "impact" argument of Respondents is no more than a "straw man" to be knocked down.

THE CHARACTERIZATION OF RETROACTIVE BENEFITS AS RESTITUTION HAS NO BASIS IN THE TRADITIONAL PRINCIPLES OF EQUITY JURISPRUDENCE.

The relief sought by the Respondents cannot be characterized as equitable restitution. The Respondents' statement that your Petitioner placed the label of "damages" on the relief is mistaken. Your Petitioner's theory has been and continues to be that the relief granted by the District Court is a "monetary award" contravening the prohibition of the Eleventh Amendment.

It is a fundamental principal of equity jurisprudence that a chancellor will always look to the substance of a

transaction as opposed to its form. *People ex rel. Barrett* v. *Fritz,* (1942) 316 Ill. App. 217, 45 N.E. 2d 48; *Knights* v. *Knights* (1922), 300 Ill. 618, 133 N.E. 377; and *Addive* v. *Grange* (1935), 358 Ill. 127, 192 N.E. 774. Hence, a retroactive monetary award against Illinois may not be viewed in the light of a label; nor may a label change the immediate principles of constitutional law.

Your Petitioner respectfully submits that the granting of "payments alleged wrongfully withheld" is not equitable restitution. A contrary conclusion would compel a substantial expansion of the parameters of the fiction of *Ex Parte Young,* 209 U.S. 123 (1907).

A proper analysis of the nature of "release of benefits wrongfully withheld" requires a finding that it is in the nature of an enforcement of an obligation imposed by statute, or in this instance a regulation of the U. S. Department of Health, Education and Welfare. Your Petitioner's Brief on the Merits fully discusses the theory of an alleged implied right presumed by Respondents to exist under the Social Security Act. Therein, Petitioner concludes that such a right does not exist. Assuming arguendo that there is an implied right, it has been firmly established by this Court that an action founded on a statutory right is in the nature of an action of assumpsit. *Metropolitan Railroad Co.* v. *District of Columbia,* 132 U.S. 1, 13 (1889). Hence, unjust enrichment is a fundamental prerequisite for the enforcement of restitution, irrespective of whether the issue is one of state law or federal law. *Rankin* v. *Emigh,* 218 U.S. 27, 54 L. Ed. 915, 921 (1910).

The facts in this case are undisputed except for the Respondent's characterization of the Petitioner's action in

defending his legal position as being "willfull and wanton".[1] Official notice can be taken that each year from 1968 to 1972, every penny of the Illinois Welfare Appropriation has been disbursed to welfare recipients.[2] No

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1. *Rodriguez* v. *Swank*, 318 F. Supp. 289 (N.D. Ill. 1970), did not place a prohibitory injunction against the enforcement of the AABD state regulations involving the time period for processing applications. At the time of filing the complaint in the present case, the final order in *Rodriguez* had not been entered. Thereafter, Petitioner's predecessors' theory was consistent with their position in the Brief on Merits in the direct appeal to this Court in *Rodriguez*.

Now Respondents seek to imply that former Director Swank was in direct contempt of the *Rodriguez* prohibitory injunction by not enforcing the time requirements in the AABD regulations which are the subject of this Writ of Certiorari. This doubtful theory is pronounced by Respondents to support their proposition that equitable restitution is proper in this case. The wisdom and candor of this philosophy are indeed questionable. The proposition is a boot strap argument.

2. In 1973, there was a welfare appropriation surplus. The surplus arose as a result of several factors including the over-budgeting of anticipated increases in the welfare assistance rolls arising from the exhaustion of unemployment compensation benefits by displaced labor. The economic picture has changed dramatically. The impact of the fuel crisis on employment in Illinois, which contains the second largest industrial market in the United States, has been particularly extreme. As this brief goes to press, there are many announcements of job displacements in the airline, transportation, steel, auto and oil industries. Hence, there is no question but that many more families will be compelled to rely upon the Illinois wel-

funds were diverted to other governmental uses by the Illinois Department of Public Aid.

Accordingly, it is respectfully submitted that there has been no unjust enrichment of the Illinois Department of Public Aid, any of its Directors, the body politic, or the taxpayers of the State of Illinois. The body politic has not retained a single dollar of the welfare appropriation; it has not turned back any funds to the Illinois General Assembly. Nor have the taxpayers of Illinois had any of their taxes reduced. If there is unjust enrichment, it will innure to the benefit of former welfare recipients who no longer qualify for assistance. It is undisputed that some of the members of the class of welfare recipients no longer qualify for assistance.

ILLINOIS NEVER WAIVED THE ELEVENTH AMENDMENT IMMUNITY.

Respondents contend, assuming arguendo that this is a suit against the State, that Illinois has consented to the suit by its actions in defending the suit and by its failure to raise an Eleventh Amendment defense before the trial Court. Petitioner agrees that under appropriate circumstances a state can waive the protection granted by the Eleventh Amendment, but contends that waiver can be found only on grounds much more limited than implied by Respondents.

With the one exception discussed below the cases cited by Respondents involve fact situations bearing no relationship whatsoever to that of the instant case. In *Mis-*

---

fare system after their statutory entitlement period for unemployment compensation benefits has been exhausted along with their private resources.

souri v. *Fiske,* 290 U.S. 18 (1933) the state was found to have waived its Eleventh Amendment immunity by having voluntarily intervened in an action as a party Defendant. In *Clark* v *Barnard,* 108 U.S. 436 (1883) in which the state intervened as a claimant of a fund under the jurisdiction of the lower Court, this Court held at 448 that the State, "thereby made itself a party to litigation to the full extent required for its (rights as a claimant to the fund) complete determination." In *Petty* v. *Tennessee-Missouri Bridge Commission,* 359 U.S. 275 (1959) the interstate compact establishing the Bridge Commission and adopted by the respective state legislatures provided that the Commission had the power to sue and be sued. Further, because Congress in approving the compact had attached a condition that nothing in the compact affected, impaired, or diminished any right, power, or jurisdiction of any Federal Court over or in regard to any navigable waters or any commerce between the states, this Court held that the states had waived their Eleventh Amendment immunity. In *Gunter* v. *Atlantic Coastline R. Co.,* 200 U.S. 273 (1905) the Eleventh Amendment immunity was found to have been waived because the relief being sought was merely ancillary relief in aid of a decree in a suit in which jurisdiction as to the state and its officers had been acquired by the voluntary action of the state in submitting its rights to judicial determination.

In each of the above cases the state being sued had come before the Court voluntarily. There is no suggestion in any of the cases that the Court would have failed to recognize a valid Eleventh Amendment defense if the respective states had been brought before the Court involuntarily.

Respondents' arguments to the effect that the Eleventh Amendment immunity defense was waived even if it originally existed are no more convincing. The quotation from *Illinois Central R. Co.* v. *Adams,* 180 U.S. 28 (1901) (Respondents' brief 40) is seriously misleading since the issue before the Court was not whether the Eleventh Amendment immunity should be raised in the pleadings as opposed to being first raised on appeal, but rather the issue was whether the Eleventh Amendment immunity was properly raised by Motion.

Respondents correctly characterized the decision in *Lidie* v. *State of California,* 478 F. 2d 552 (9th Circ. 1973), but whatever the powers of the California Attorney General, it is clear that neither the Attorney General of Illinois nor any of his assistants has the power to waive the State's Eleventh Amendment immunity.

Clearly, the decision as to which individual(s) or governmental body shall be given the power to waive the State's sovereign immunity is peculiarly a question of State law rather than Federal. The long standing rule that neither the Attorney General nor his assistants has the power to waive the State's sovereign immunity, *People of the State of Illinois* v. *the Sanitary District of Chicago,* (1904) 210 Ill. 171, was not altered by the enactment of Article 13, Section IV of the Illinois Constitution of 1970 and Section 801, Chapter 127 of the Illinois Revised Statutes, 1971, enacted pursuant thereto, both of which became effective on January 1, 1972. *Chicago Welfare Rights Organization* v. *Weaver,* (1972) 5 Ill. App. 3rd 655. No authority was given to the Attorney General to waive the State's sovereign immunity.

In the absence of an express intendment of Congress under the Social Security Administration Act creating

the "alleged deprived federal right" the questions of how Illinois can waive its immunity from suit under the Eleventh Amendment, and who in Illinois can waive the protection, are clearly issues of state law. The Respondents never address themselves to the statutory intendment issue. Notwithstanding, Respondents make two points in their Brief casting doubt on the status of the law of who can waive Illinois' Eleventh Amendments Rights in Footnote 27 and again in Footnote 14, casting doubt on the application of the doctrine of sovereign immunity under the Illinois Constitutions of 1870 and 1970 and their application to the request for monetary award.

With respect to Respondents' argument that *Monroe* v. *Collins,* 393 Ill. 553, 66 N.E. 2d 670 (1946) creates a doubt as to "who can waive Illinois' right to sovereign immunity", your Petitioner is baffled as to how the *Monroe* decision relates to the decisive utterance of the Supreme Court of Illinois in *Illinois* v. *Sanitary District,* 210 Ill. 171, 71 N.E. 334 (1904) prohibiting waiver of sovereign immunity, and accordingly the Eleventh Amendment. The decision in *Illinois* v. *Sanitary District* has not been overruled expressly or *sub silento,* and its law has continued vitality as witnessed in *Powers* v. *Tealeander,* 129 Ill. App. 2d 10, 262 N.E. 2d 342 (1970), and *Chicago Welfare Rights Organization* v. *Weaver, supra.*

Respondents' comments relating to the *Chicago Welfare Rights* decision by the Illinois Supreme Court are incorrect and misleading by asserting that welfare recipients would be barred from the Courts of the State of Illinois. According to Respondents' theory, "the reasoning in *Chicago Welfare Rights Organization* v. *Weaver, supra,* has been rejected by the Illinois Supreme Court." (For purposes of convenience your Petitioner attaches hereto a

copy of the Illinois Supreme Court decision, which has not yet been published, as Appendix A.

Chicago Welfare Rights Organization contains no express language rejecting the opinion of the Illinois Appellate Court appearing at 5 Ill. App. 3rd 655 (1972). Nor is there any implied language rejecting the application of the law contained in the Illinois Appellate decision. The Illinois Supreme Court disposed of *Chicago Welfare Rights Organization* by statutory construction. The Illinois Appellate Court case still stands as good law for the decisive utterance that such actions relating to monetary awards are maintainable only in the Illinois Court of Claims. The Illinois Supreme Court decision does not foreclose this proposition.

The rationale for this approach is that the Court of Claims mechanism, established by the Illinois General Assembly more than four decades ago, provides for the specialized budgeting function of matching costs of Illinois government with its finite resources. Hence, Respondents' statement that the "decision of the Illinois Supreme Court denies a class of welfare recipients . . . a remedy of equitable restitution in Illinois courts . . ." is a mistaken impression of the law tending to create disbelief as to the application of *Employees of the Department of Health Education and Welfare, State of Missouri*, v. *Department of Public Health and Welfare, State of Missouri*, 411 U.S. 279 (1973), to the facts of this case.

As in *Employees*, the Respondent class should be directed to look to the Illinois Courts for redress of the monetary aspect of the relief that they seek. The same policy considerations are present here as in *Employees*. These considerations involve the interpretation of the

statutory intendment of the Social Security Act, and the ramifications of the Eleventh Amendment, and Article 1, Section 8 of the Constitution.

With respect to the state remedies aspect of *Employees*, Respondents have urged that their class would be afforded only a "truncated remedy" unless full relief could be awarded. Hence they seek the extension of the parameters of the fiction of *Ex Parte Young, supra.*

The limitations of the parameters of the doctrine of *Ex Parte Young* cause no injury, though possibly some inconvenience. Courts have historically countenanced such inconvenience in denying class actions in which the operative facts with regard to each member of the purported class were different, *Hercules* v. *Minnesota Highway Department,* 337 F. Supp. 795 (D.C. Min. 1972). This principle of law has application to the present case because the operative facts of each member of this class are distinct and different. This is evident when viewed from the focal point of the expressed intendment of Congress that welfare assistance be granted only to provide funds for present need. The issue of present need is a fact question that is different for every member of the class.

The Illinois Appellate Court's decision in *Chicago Welfare Rights Organization* v. *Weaver, supra* provides the rationale for harmonizing the two competing policy considerations that are involved in the funding of retroactive assistance. The two policy considerations are the right to redress, assuming arguendo an implied right in the Social Security Act, and the right of the State to preserve the integrity of the State budgetary process. In the Court of Claims each applicant files a complaint for retroactive assistance and a separate fact hearing is held. No constitutional rights are impaired by this process.

RESPONDENTS' CITATIONS UNDER THE RECONSTRUCTION AMENDMENTS CAN BE HARMONIZED WITH A FINDING THAT THE ELEVENTH AMENDMENT PROHIBITION LIMITS THE JUDICIAL RELIEF AVAILABLE TO THE RESPONDENTS.

Respondents urge that their rights are redressable under 42 U.S.C. Section 1983. Since the Civil Rights Act is an extension of the Reconstruction Amendments adopted after the Civil War, it necessarily follows, they argue, "that the Eleventh Amendment prohibition has been abrogated."

However, a close analysis of Title 42 U.S.C. 1983 belies this assertion. Section 1983 only provides claimants with a right to redress claims against Dependants who "subject, or cause to be subjected any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . . ." Section 1983 does not create by its own terms a substantive right to welfare assistance. Rather it is necessary to look to the statute creating the substantive right to assistance. Without the Social Security Act, there would be no right to assistance.

Petitioner stresses that the record herein does not involve a deprivation of equal protection of the laws. The issue was decided by motion and upon the application of the Supremacy of the Laws Clause of the Constitution. The decision of the District Court was consistent with the holdings of this Court that the substantive rights of welfare recipients are predicated specifically on provisions

of the Social Security Act. *Rosado* v. *Wyman*, 397 U.S. 397 (1970) and *Townsend* v. *Swank*, 404 U.S. 282 (1971).

Accordingly, it is respectfully submitted that the focal point of analysis is the issue of whether the Social Security Act created a right to retroactive assistance. If so, the next issue to be addressed is whether the application of the supremacy clause must be read in *para materia* with the Eleventh Amendment prohibition. It is respectfully submitted that the Supremacy Clause only establishes priorities of law. Since the Social Security Act was predicated upon powers of the Federal government to levy taxes, it necessarily follows that there is no implied consent to suit when Illinois participated in federally funded welfare programs. The doctrine of implied consent is predicated upon legislation enacted under the Commerce Clause. *Employees, supra* (concurring opinion of Justice Marshall).

Nor does the record establish any express consent. The Supremacy Clause ought not necessarily give rise to any greater power than that committed to Congress permitting it to enact the Social Security Act.

With respect to the legislative history of the Social Security Act, Petitioners direct the Court's attention to *Steward Machine Company* v. *Davis*, 301 U.S. 548 (1936), discussing the relationship of Article I, Section 8, of the Constitution to the right of the federal government to lay and collect duties, imports, and excises.

Hence, the analysis of the relationship between the Commerce Clause and the Eleventh Amendment discussed in *Employees* and developed in Mr. Justice Marshall's concurring opinion has no application to this case.

Accordingly, the analysis of the Respondents urging the finding of law that the enabling legislation under the Fourteenth Amendment abbrogates the prohibition contained in the Eleventh Amendment must fall.

RESPONDENTS HAVE CREATED A "STRAW MAN" ARGUMENT IN CHARACTERIZING PETITIONERS' THEORY AS BEING THAT ANY SUIT WHICH HAS AN IMPACT ON THE STATE TREASURY IS BARRED BY THE ELEVENTH AMENDMENT.

Petitioner argues in his brief at page 29 that "a suit seeking a monetary award from the fisc of a local body politic is a suit against the State barred by the Eleventh Amendment." Respondents have set up a "straw man" by characterizing Petitioner's position as "equitable relief which has an impact on the State Treasury" is barred by the Eleventh Amendment. This "straw man" is then knocked down by Respondents by citing cases that in substance are not responsive to the gist of your Petitioner's theory.

The cases cited by Respondents do involve claims brought against public officials in which the relief ultimately granted had an "impact" on the State Treasury. However, Respondents cite no case in which a monetary award to be paid from the State Treasury for an alleged violation of a derivative statute was upheld over Eleventh Amendment objections. The reapportionment cases cited by Respondents all involved violations of the requirements set forth in Article 1, Section 2 of the Constitution rather than statutory violations. The likelihood that the States involved would incur expenses as a result of the Court's injunctive and declaratory relief was mere-

ly incidental. In *Sims* v. *Amos,* 340 F. Supp. 691 (M.D. Ala. 1972), the District Court awarded substantial costs and attorneys fees against individual state officers after determining that the decision to award said fees had lost much of its discretionary character due to the long standing failure of the state officials to carry out their constitutional obligations to reapportion.

Likewise, the numerous cases cited by Respondents arising out of various "welfare" programs all involved violations of constitutionally guaranteed equal protection and/or due process. *Graham* v. *Richardson,* 403 U.S. 365 (1971) ordered the granting of declaratory and injunctive relief for welfare benefits wrongfully withheld from aliens in violation of equal protection guarantees. *Shapiro* v. *Thompson,* 394 U.S. 618 (1969) granted relief after finding violations of constitutional guarantees to equal protection and due process. In affirming *Thompson* v. *Shapiro,* 270 F. Supp. (D.C. Conn. 1967) the Court upheld an award of "damages"; the two companion cases did not involve awards of damages. *Goldberg* v. *Kelly,* 397 U.S. 254 (1970) involved an award of declaratory and injunctive relief in the face of a violation of procedural due process requirements.

Vlandis v. *Kline,* 409 U.S. 1036 (1973) sustained relief to the Plaintiff on the grounds that a Connecticut law preventing students in state universities from gaining the benefits of lower tuition rates for in-state citizens by becoming Connecticut citizens after application for admission to state universities was unconstitutional denial of due process. The Court provided for equitable resitution of excess tuition wrongfully collected by the State. Equitable restitution was clearly applicable here, since to allow Connecticut to keep the excess tuition would have been unjust enrichment of the State.

Two of the cases cited by the Respondents are best characterized as "racial discrimination" cases. *Cook* v. *Davis,* 178 F. 2d 595 (5th Cir. 1949), *Cert. denied,* 340 U.S. 811 (1950) found salary discrimination against Negro teachers to be a denial of due process and equal protection. But, in denying an Eleventh Amendment objection, the Court found at 599 "nothing was sought to be recovered against the State, nor is any right of the State sought to be impaired." *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218 did give the lower Court the widest degree of latitude in providing equitable relief including the power to order the school board to levy taxes to maintain schools. Nevertheless, in rejecting an Eleventh Amendment argument in this case involving violations of equal protection guarantees, the Court specifically held at 228, "that suits against the state and county officials to enjoin them from invading *constitutional rights* (emphasis added) are not forbidden by the Eleventh Amendment."

Respondents' characterization of *Osborn* v. *Bank of United States,* 22 U.S. (9 Wheat) 738 (1824) and *Perez* v. *Ledesma,* 401 U.S. 82 (1971), are both misleading. In *Osborn* the Defendant was ordered to repay money collected by him as a tax for the State of Ohio after the District Court had specifically enjoined him from collecting the tax. The sovereign immunity argument was raised by the state official only after the injunction had been issued and violated. Chief Justice Marshall upheld the power to issue the injunction against the state officials even though they were acting as agents for the State of Ohio, which could not be made a party Defendant. The power of the Court to order restitution of the taxes collected after the entry of the injunction was nothing more

than the use of the inherent power of the Court to return the parties to the position they occupied at the time of the entry of the injunction.

The quote from Mr. Justice Brennan in *Perez* is taken not from a concurring opinion but from the dissent portion of an opinion concurring in part and dissenting in part. The cited portion was taken out of context from a more lengthy discussion of the Court's efforts to balance the Eleventh Amendment against rights and powers secured elsewhere in the Constitution, which discussion began at 104.

Finally, Respondents cite cases brought by or on behalf of prisoners or individuals committed to mental health institutions. In each case the Court denied the Eleventh Amendment arguments, but again, only in the face of violation of the Plaintiffs' constitutional rights, including rights under the Eighth Amendment.

It is clear then, as stated in *Holt* v. *Sarver,* 442 F. 2d 304, 306 (8th Circ. 1971) that "the State has no power to impart to him (the state official being sued) any immunity from responsibility to the supreme authority of the United States (the Constitution)". There is no doubt that forced to choose between granting relief against a violation of an individual's constitutional rights and the sovereign immunity of the state as guaranteed by the Eleventh Amendment, the Courts have consistently chosen to enforce the individual's rights by restricting the scope of the Eleventh Amendment, but Respondents cite no case, nor have any been found by Petitioner in which a mere statutory right has been allowed to take precedence over the provisions of the Eleventh Amendment.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request this Court to reverse the judgment of the court below.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street, Room 900,
Chicago, Illinois 60601 (793-3500),

Attorney for Petitioners.

DONALD S. CARNOW,
Special Assistant Attorney General,
300 West Washington Street,
Chicago, Illinois 60606,

Of Counsel.

DATE: December 7, 1973

APPENDIX A

OPINION

SUPREME COURT OF ILLINOIS
UNITED STATES OF AMERICA

STATE OF ILLINOIS
SUPREME COURT } SS.

AT A TERM OF THE SUPREME COURT, *begun and held in Springfield, on Monday the tenth day of September in the year of our Lord one thousand nine hundred and seventy-three, within and for the State of Illinois.*

PRESENT: ROBERT C. UNDERWOOD, CHIEF JUSTICE
JUSTICE WALTER V. SCHAEFER
JUSTICE DANIEL P. WARD
JUSTICE JOSEPH H. GOLDENHERSH
JUSTICE THOMAS E. KLUCZYNSKI
JUSTICE CHARLES H. DAVIS
JUSTICE HOWARD C. RYAN
WILLIAM J. SCOTT, ATTORNEY GENERAL
WILLIAM G. LYONS, MARSHAL
ATTEST: JUSTIN TAFT, CLERK

BE IT REMEMBERED, *that afterwards, to-wit, on the 25th day of September, 1973 the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:*

Chicago Welfare Rights Organization, a not-for-profit corporation, et al., etc., et al.,
Appellants,
No. 45253
vs.
Edward T. Weaver, as Successor to Harold O. Swank, Director, Illinois Department of Public Aid; et al., etc.,
Appellees.
} **Appeal from Appellate Court First District**

JUSTIN TAFT
Clerk of the Supreme Court
State of Illinois

Docket No. 45253—Agenda 13—May, 1973

CHICAGO WELFARE RIGHTS ORGANIZATION, *et. al.*, Appellants, v. EDWARD T. WEAVER et al., Appellees.

MR. JUSTICE SCHAEFER delivered the opinion of the court:

This case is here on leave granted to appeal from a judgment of the Appellate Court, First District (5 Ill. App. 3d 655), which reversed a judgment of the circuit court of Cook County. The substantive issue in the case concerned the correctness of the determination of the Director of the Department of Public Aid as to the maximum shelter allowance payable under the program of Aid to Families with Dependent Children (AFDC). The circuit court ruled that the Director had ultimately determined the maximum shelter allowance correctly, but that he had unlawfully delayed in doing so. The court therefore ordered the defendants, the Director, the Auditor of Public Accounts, and the State Treasurer, to pay to recipients under the program the benefits which would have been payable but for the Director's unlawful delay in increasing the maximum allowance. Both the defendants and the plaintiffs appealed. The appellate court reversed the judgment and dismissed the cause, on the ground that the circuit court lacked jurisdiction because "the plaintiffs should have brought their suit in the Court of Claims." (5 Ill. App. 3d 655, 660 (1972).) For the reasons stated below, we affirm.

In order to understand the problems presented, an explanation of the Federal and State statutory schemes is necessary. The Social Security Act established the Aid to

Families with Dependent Children program. Section 401 of that statute provides: "The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary [of the Department of Health, Education, and Welfare], State plans for aid and services to needy families with children." (42 U.S.C. sec. 601.) Section 402 states the elements necessary to qualify a plan for Federal funding and directs the Secretary to approve any plan which fulfills those conditions. (42 U.S.C. sec. 602.) Illinois has adopted a plan for which it receives Federal payments under this statute. Ill. Rev. Stat. 1969, ch. 23, par. 4—1 *et seq.*

In 1968 Congress added the following new requirement, hereafter referred to as section 402(a)(23):

> "*** that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adadjusted." Pub. L. 90—248, sec. 213(b), 81 Stat. 898; 42 U.S.C. sec. 602(a)(23).

The Illinois statute authorizes the Department to:

> "Establish standards by which need for public aid will be determined and amend such standards from time to time as circumstances may require." Ill. Rev. Stat. 1969, ch. 23, par. 12—4.11.

The statute continues:

> "The standards shall provide a livelihood compatible with health and well-being for persons eligible for financial aid under any Article of this Code. They shall include recognition of any special needs ***.

> The quantity and quality of the items included in the standards established for food, clothing, and other basic maintenance needs shall take account of the buying and consumption patterns of self-supporting persons and families of low income, as determined from time to time by the United States Department of Agriculture, the United States Bureau of Labor Statistics, and other nationally recognized research authorities in the fields of nutrition and family living.
>
> The items in the standards shall be priced periodically for changes in cost, as provided in Section 12—4.15, and allowances adjusted as indicated by the findings of such surveys.***
>
> In establishing a standard for shelter, the Department shall take in account in each community the prevailing rates or costs for housing of low income persons and the factors which influence the level of such rates or charges. However, the shelter standard for any recipient, exclusive of household furniture and utilities, shall not exceed $90 per month, except for adjustments made in the manner authorized by Section 12—14." Ill. Rev. Stat. 1969, ch. 23, par. 12—4.11.

The Illinois statute thus provides separately for various expenses, and requires periodic adjustment in the allowance for some items to reflect increases in the cost of living. (*Cf.* Ill. Rev. Stat. 1969, ch. 23, par. 4—2.) Apparently the requirement of section 402(a)(23) was met as to those items, and they are not involved in this lawsuit. The problem centers upon the statutory maximum of $90 for shelter allowance.

The Illinois statute authorizes adjustments in the $90 maximum "in the manner authorized by Section 12—14." That section provides for a "Legislative Advisory Committee on Public Aid" to be composed of six members of the House of Representatives and six members of the Senate, and further provides:

> "When limitations are imposed by this Code or by any other law on grants to recipients of public aid, the Illinois Department may authorize deviations from such limitations only after prior notice to and consultation with the Committee. If two-thirds of the membership of the Committee determine as a matter of policy that deviations from such limitations should or should not be made, the Illinois Department shall give substanial consideration to such determination." Ill. Rev. Stat. 1969, ch. 23, par. 12—14.

Of course the $90 maximum could have been adjusted by amending the statute, but the legislature did not do so before the July 1, 1969, deadline set by section 402(a)(23) and has not yet done so.

Despite the statutory maximum, many Illinois AFDC families received more than $90 per month for shelter because the Department of Public Aid, acting pursuant to section 12—14, had from time to time established a specific number of authorized "exceptions." At all times the number of authorized "exceptions" substantially exceeded the number of recipients who needed more than $90. *Cf. Metcalf* v. *Swank,* 293 F. Supp. 268 (N.D. Ill. 1968), 305 F. Supp. 785 (N.D. Ill. 1969), *aff'd,* 444 F. 2d 1353 (7th Cir. 1971), *vacated and remanded,* 406 U.S. 914, 32 L. Ed. 2d 113, 92 S. Ct. 1778, 1972).

The Illinois Department contended that this administrative practice constituted compliance with section 402 (a)(23). The Federal Department of Health, Education, and Welfare (HEW) rejected this contention. Considerable correspondence and negotiation followed. In May of 1970, following a meeting with the Legislative Advisory Committee, the Illinois Department of Public Aid (IDPA) announced its intention to increase the maximum shelter

allowance to $95 to take account of increased costs during the period from July 1967 to January 1970. This increase became effective July 1, 1970. In July, 1970, the Chicago Welfare Rights Organization, a plaintiff in this case, wrote to HEW alleging, in part, that the increase was improperly computed. On August 18, 1970, HEW notified the Illinois Department that the adjustment must reflect changes in costs since August, 1963, when the $90 maximum was enacted by the legislature, and that "the period September 1, 1963, to July 1, 1969 would be [an] acceptable measuring period." On August 22, 1970, this action was filed. On August 27, 1970, the Illinois Department increased the shelter allowance maximum to $97.

It is against this statutory and administrative background that the procedural issues with which we shall be primarily concerned arise. Three of the plaintiffs, Ernestine Hollins, Doris Johnson, and Alberta Lee, are mothers of dependent children who sue on their own behalf and on behalf of other individuals similarly situated. Each of them was required to, and did, pay shelter rent in excess of $90. The plaintiff, Chicago Welfare Rights Organization, is described as "an unincorporated association of some 20 welfare rights organizations in the Chicago area representing approximately 3000 families receiving public assistance benefits." The plaintiff, Southside Concerned Subsidized Parents, is described as "an unincorporated association of some 300 families living on the south side of Chicago who receive public assistance benefits."

In view of the disposition that we make of these cases, we find it unnecessary to consider the standing of these two organizations to maintain this action. The three individual plaintiffs assert their own rights and those of the

members of a class whom they purport to represent, and they are proper parties. The primary relief that they seek is a mandatory injunction to compel the defendants to pay to the plaintiffs the amounts to which they claim to be entitled, as well as money judgments for any amounts that had been improperly withheld or denied. The appellate court centered its attention upon the latter claim, and held that it could be asserted only in the Court of Claims. In our opinion the appropriate focus is upon the failure of the plaintiffs to invoke the administrative remedies available to them.

Although section 12—4.11 states a fixed maximum shelter rent allowance, it also authorizes shelter allowances in excess of that maximum by way of administrative adjustments. The Department has consistently exercised its authority to make administrative changes in individual shelter rent allowances, and it has by administrative action increased the maximum applicable to all cases beyond the $90 limit still stated in the statute.

Section 11—8.7 provides that judicial review of administrative decisions of the Department shall be governed by the Administrative Review Act. (Ill. Rev. Stat. 1969, ch. 23, par. 11—8.7.) The Administrative Review Act provides:

> "This Act shall apply to and govern every action to review judicially a final decision of any administrative agency where the Act creating or conferring power on such agency, by express reference, adopts the provisions of this Act. In all such cases, any other statutory, equitable or common law mode of review of decisions of administrative agencies heretofore available shall not be employed ***." Ill. Rev. Stat. 1969, ch. 110, par. 265.

We see nothing in the facts of this case that would justify a disregard of this plain provision. If this action can be maintained in the face of the statutory prohibition, it is difficult to conceive of any area in which the Administrative Review Act can operate. *Cf. People ex rel. Chicago and North Western Ry. Co.* v. *Hulman,* 31 Ill. 2d 166 (1964); *Johnson* v. *Ogilvie,* 47 Ill. 2d 506 (1970).

Our conclusion is not altered by the circumstance that the plaintiffs stated their claim in two counts, one based upon the State law and the other upon the Federal Civil Rights Act of 1871 (42 U.S.C. sec. 1983). Both counts alleged the same facts and sought the same relief. It has been held that there is no requirement that administrative remedies be exhausted when a State welfare plan is challenged under section 1983 in a Federal court. (*Carter* v. *Stanton,* 405 U.S. 669, 31 L. Ed. 2d 569, 92 S. Ct. 1232 (1972); *Damico* v. *California,* 389 U.S. 416, 19 L. Ed. 2d 647, 88 S. Ct. 526 (1967).) In *Damico* the United States Supreme Court stated:

> "The three-judge District Court dismissed the complaint solely because 'it appear[ed] to the Court that all of the plaintiffs [had] failed to exhaust adequate administrative remedies.' This was error. In *McNeese* v. *Board of Education,* 373 U.S. 668, noting, that one of the purposes underlying the Civil Rights Act was 'to provide a remedy in the federal courts supplementary to any remedy any State might have,' *id.,* at 672, we held 'relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided [an administrative] remedy,' *id.,* at 671. See *Monroe* v. *Pape,* 365 U.S. 167, 180-183." 389 U.S. at 416-17, 19 L. Ed. 2d at 648.

The fact that a Federal district court would take jurisdiction of an action of this kind neither requires nor

justifies the courts of this State in doing so. The Supreme Court of the United States said in *Rosado* v. *Wyman*, 397 U.S. 397, 422, 25 L. Ed. 2d 442, 461, 90 S. Ct. 1207 (1970):

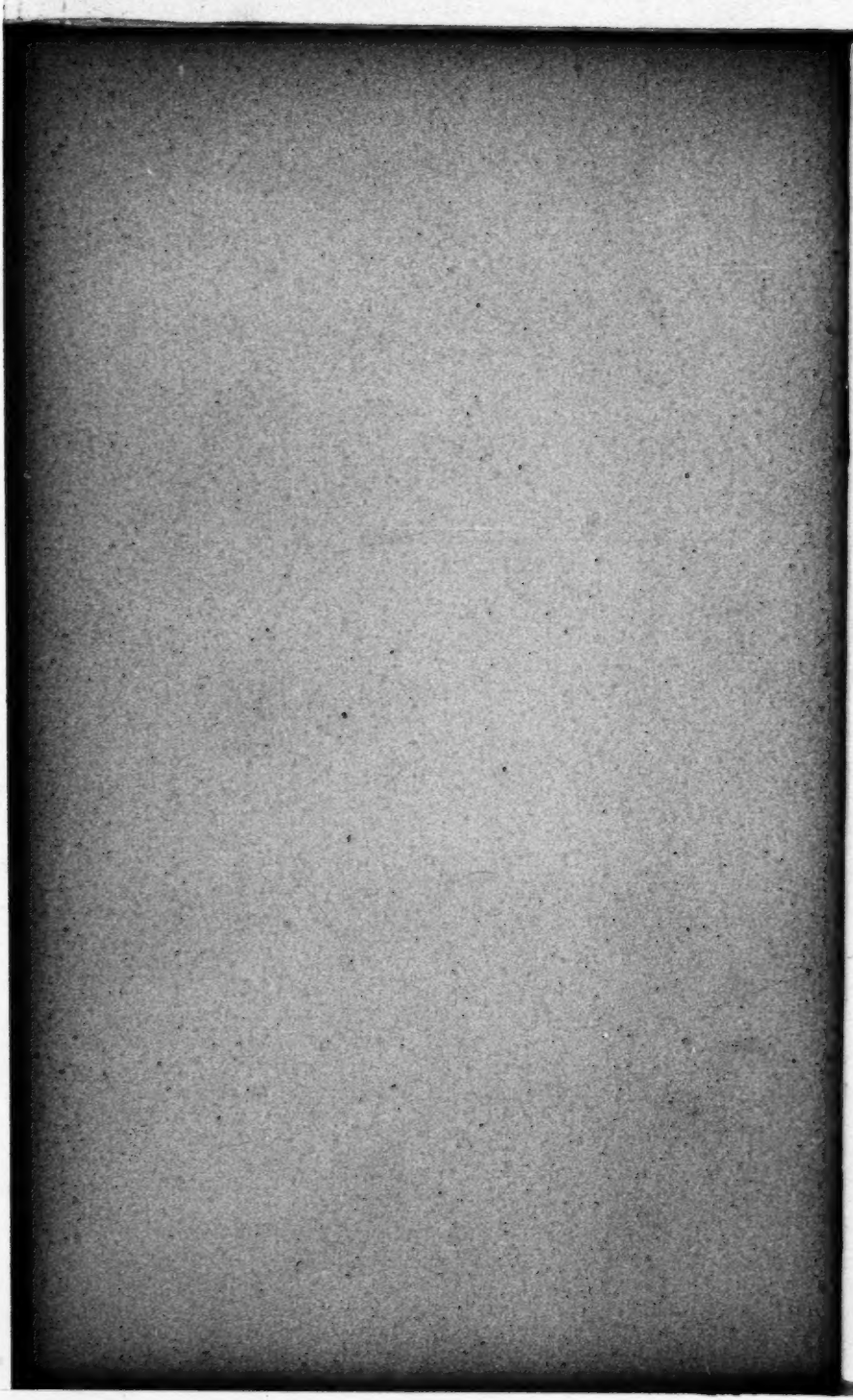
> "While we view with concern the escalating involvement of federal courts in this highly complicated area of welfare benefits, one that should be formally placed under the supervision of HEW, at least in the first instance, we find not the slightest indication that Congress meant to deprive federal courts of their traditional jurisdiction to hear and decide federal questions in this field."

The situation is not the same insofar as Illinois courts are concerned. The governing statute provides for administrative review at the instance of individual applicants or recipients, and it provides that administrative decisions shall be judicially reviewable under the Administrative Review Act. Illinois provided a remedy for the grievances that the plaintiffs assert, but they did not choose to pursue it.

In our opinion the fact that the General Assembly had made available an administrative remedy, followed by judicial review, negatives the conclusion of the appellate court that plaintiffs' only remedy was by a proceeding in the Court of Claims.

For the reasons stated in this opinion, the judgment of the appellate court dismissing the action is affirmed.

Judgment affirmed.



SUPREME COURT, U. S.

FILED

APR 17 1974

MICHAEL RODAK, JR., C

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

No. 72-1410

JOEL EDELMAN, DIRECTOR OF ILLINOIS DEPARTMENT OF PUBLIC AID, *et al.*,

Original Petitioners,

v.

JOHN JORDAN, *et al.*,

Original Respondents, Petitioners for Rehearing.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING

SHELDON ROODMAN

Legal Assistance Foundation of Chicago
64 East Jackson Boulevard
Chicago, Illinois 60604
(312) 922-5625

Attorney for Plaintiffs-Petitioners

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

PETITION FOR REHEARING 1

ARGUMENT

I. TO REQUIRE PERSONS TO SEEK REDRESS IN STATE COURTS FOR VIOLATIONS OF SECTION 1 OF THE CIVIL RIGHTS ACT OF 1871 IS TOTALLY AT ODDS WITH THE LANGUAGE OF THAT ACT, THE INTENT OF ITS FRAMERS, AND THE LEGISLATIVE HISTORY SURROUNDING ITS ADOPTION 2

II. THE RELATIONSHIP BETWEEN THE FOURTEENTH AMENDMENT AND THE ELEVENTH AMENDMENT MUST BE CONFRONTED IN THIS CASE BECAUSE THE ACTIONS OF THE DEFENDANTS HEREIN WERE IN VIOLATION OF THE FOURTEENTH AMENDMENT 13

III. THE RELIEF UNHELD IN EX PARTE YOUNG WAS NOT "PROSPECTIVE ONLY" AS STATED IN THE MAJORITY OPINION 17

IV. BASED ON ILLINOIS LAW AN ORDER FOR RETROACTIVE PAYMENTS WOULD NOT REDUCE THE FIXED APPROPRIATION FOR PUBLIC AID 20

V. THE PLAINTIFFS IN THIS CASE HAVE NO MEANS OF ENFORCING THEIR 1983 CLAIM IN THE STATE COURTS OF ILLINOIS 21

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PETITION FOR REHEARING

Now comes John Jordan, by his attorney, and petitions this Court for an order (1) vacating its previous decision and judgment, and (2) granting a rehearing of this cause. In support of this petition, John Jordan states as follows:

I.

TO REQUIRE PERSONS TO SEEK REDRESS IN STATE COURTS FOR VIOLATIONS OF SECTION 1 OF THE CIVIL RIGHTS ACT OF 1871 IS TOTALLY AT ODDS WITH THE LANGUAGE OF THAT ACT, THE INTENT OF ITS FRAMERS, AND THE LEGISLATIVE HISTORY SURROUNDING ITS ADOPTION.

The majority opinion reaffirms the principle that public aid recipients may bring an action against state public aid officers under Section 1 of the Civil Rights Act of 1871 (now Section 42 U.S.C. §1983) to invalidate state laws in contravention of the Social Security Act, and thereby in contravention of the Supremacy Clause, Art. 6, cl. 2. (*See Hagans v. Lavine*, ____ S. Ct. ____ (March 25, 1974)). Further, a federal court may grant prospective mandatory injunctive relief against said state officers, notwithstanding the Eleventh Amendment. On the other hand, a federal court in such a 1983 action is barred by the Eleventh Amendment from granting any relief against state officers[1] which is retrospective in nature, or, in other words, relief which provides redress to the plaintiffs in the case who are actually injured by the unconstitutional state laws. Thus, the plaintiffs must pursue in the state courts their 1983 claims for redress of "rights, privileges, and immunities secured by the Constitution and laws."

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[1] The Court reaffirms that retrospective relief against counties and county officers is not barred by the Eleventh Amendment. *Edelman v. Jordan*, footnote 12 (Sl. Op. at 15-16). However, the Court overlooks the fact that the retrospective relief in this case was in fact directed against "all of the County Department of Public Aid in the State of Illinois." *Edelman v. Jordan*, footnote 5.

It is respectfully submitted that the proposition that some relief under a 1983 claim against a state officer acting in violation of the United States Constitution may not be heard in the federal courts, but instead is left to the state courts of the several states, is so totally at odds with the language of the Civil Rights Act of 1871, the intent of the framers of that legislation, and the legislative history surrounding its adoption, that this Court should grant the petition for rehearing and reset this case for reargument.

First, it is necessary to examine the entire original language of Section 1 of the Civil Rights Act of 1871.

> "That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases." 17 Stat. 13

Although the present Section 1983 ends with the word "redress," the latter part of the original section is

significant in establishing that the full panoply of remedies were to be available to the federal court to provide "redress" for the deprivation of "rights, privileges, and immunities secured by the Constitution." That Congress intended that complete relief was to be granted for violations of Section 1 is also indicated by the contrast between the sweeping language with respect to remedies found in Section 1 and the language, for example, of Section 6, of the same Act, limiting the relief to damages resulting from proscribed conduct. Moreover, Section 1 expressly incorporated the remedies available under the Civil Rights Act of 1866, entitled "An Act to protect all Persons in the United States in Their Civil Rights, *and furnish the Means of Their Vindication.*"[2] (Emphasis added.) Thus the language of Section 1 of the Civil Rights Act of 1871 manifests the congressional intent to provide for the full range of remedies, both legal and equitable, to be available to the federal courts in suits against state officers, and offers no support whatsoever for the conclusion that equitable remedies, retrospective in nature, were barred. As stated in *Monroe v. Pape*, 365 U.S. 167, 178: "It was precisely that breadth of the remedy which the opposition emphasized."

Moreover, the debates in Congress establish unequivocably that Section 1 of the Civil Rights Act of 1871 was designed, *inter alia*, (1) to provide a remedy

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[2] The Civil Rights Act of 1866 expressly provided

"that the district courts of the United States within their respective districts, shall have . . . cognizance . . . of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the state or locality where they may be any of the rights secured to them by the first section of this act; . . . ." 14 Stat. 27

against the States; (2) that the States act through their officers and therefore this section provided for actions against state officers in their official capacity; (3) that such remedy was to be available in the federal courts; (4) that the jurisdiction of the federal courts was being expanded to allow for such suits; and (5) that the federal courts were to fashion whatever remedy was necessary in order to provide "redress" to the injured person.

Any analysis of the original meaning and intent of Section 1 of the Civil Rights Act of 1871 must begin with the speech of Mr. S. Shellabarger, the sponsor of the bill. Cong. Globe, 42nd Cong., 1st Sess., Appendix at 67-71. There can be no doubt that he understood Section 1 as providing a remedy against the States through its officers. He asserted that "the United States always has assumed to enforce, as against the States, and also persons, every one of the provisions of the Constitution," and that there were situations "where the court secures the rights or the liabilities of persons within the States, as between such persons and the States." *Id.* at 69. After describing these situations, he states:

> "And, sir, every one of these—the only provisions where it was deemed that legislation was required to enforce the constitutional provisions—the only three where the rights or liabilities of persons in the States, *as between these persons and the States,* are directly provided for, Congress has by legislation affirmatively interferred to protect or to subject such persons." *Id.* at 69-70 (Emphasis added.)

Moreover, he leaves no doubt that Section 1 is designed to do more than merely invalidate state laws.

"But that would not do where personal rights were invaded by the States. Congress has never hesitated to provide the necessary affirmative legislation to enforce the personal rights which the Constitution guarantees, *as between persons in the State and the State itself.*" *Id.* at 70. (Emphasis added.)

That these rights were to be enforced in the federal courts, and not in the state courts is also emphasized.

"To say that Congress can do no such thing as to make any laws so enforcing these rights, nor open the United States courts to enforce any such laws but must leave all the protection and law-making to the very States which are denying the protection, is plainly and grossly absurd." *Id.* at 68.

That Section 1 was intended to reach the States through its officers was also understood by other members of Congress.

"For the neglect or refusal of a State to perform a constitutional duty, the remedies and powers of enforcement given to the General Government are few and restricted. It cannot perform the duty the Constitution enjoins upon the State . . . Nor do prohibitions upon States authorize Congress to exercise the forbidden power. It may doubtless require state officers to discharge duties imposed upon them as such officers by the Constitution of the United States. A State office must be assumed with such limitations and burdens, such duties and obligations, as the Constitution of the United States attaches to it . . . What more appropriate legislation for enforcing a constitutional prohibition upon a State than to compel State officers to observe it? Its violation by the State can only be consummated through the officers by whom it acts . . . If the federal government can compel state

officers to act under State laws in the collection of a money bond, can it not insist upon their performance of duties imposed by the Constitution upon State officers by means of which equal protection is secured for life and person?" Cong. Globe, 42nd Cong., 1st Sess., App. at 314 (Burchard)

* * *

"The Civil Rights and enforcement bills heretofore passed provided for the punishment of those acting as state officers who attempted to execute the laws of a state in conflict with the Constitution of the United States. Is not an individual acting as a state officer, upon whom, as such officer, the Constitution and laws of the United States impose the performance of those duties, also amenable to laws of the United States for their nonperformance? . . .

"The bill thus amended will—(1) afford further redress for violations under State authority of constitutional rights. . . ." *Id.* at 315

Similarly, Senator Morton stated:

"The Government can act only upon individuals. It cannot prevent the Legislature of a State from passing an act or compel the passage of an act . . . The legislation which Congress is authorized to enact must operate, if at all, upon individuals.

* * *

"We are not proposing to tear up what has been done, to reconstruct again, but simply to provide for the protection of life and property, to enforce rights that are guaranteed by the Constitution and laws of the United States." *Id.*, App. at 251.

The proposition that the federal courts were being granted the judicial power to hear, decide, and grant

redress in such suits against state officers, in contradistinction to the state courts, was also commonly understood by both the proponents and opponents of the bill.

> "Its whole effect is to give the Federal Judiciary that which now does not belong to it—a jurisdiction that may be constitutionally conferred upon it, I grant, but that has never yet been conferred upon it . . . I am certainly not in favor of denying to any man who is deprived unlawfully of his rights, his privilege, or his immunity, under the Constitution of the United States, that redress to which every man is entitled whose rights are violated; but I do think that it is a most impolitic provision, that in effect may transfer the hearing of all such causes into the federal courts." 42nd Cong., 1st Sess. App. at 216 (Senator Thurman)

> "[Section 1] is a covert attempt to transfer another large portion of jurisdiction from the State tribunals, to which it of right belongs, to those of the United States." *Id.* at App. 50 (Kerr)

> "I shall say very little about the first section which is the least objectionable of the first four sections, for I would admit that the federal courts could, in a certain way already provided, take cognizance of the offenses therein mentioned, but I object to it on the ground that it is a delay of justice . . . It does not even give the state courts a chance to try questions, or to show whether they will try the questions that might come before them under the first section of the Fourteenth Amendment, fairly or not. It takes the whole question away from them in the beginning." *Id.* at 86 (Storm)

> "They ask us to take away from the local courts of the States their entire criminal and civil jurisdiction because under the broad description of

'rights' craftily super-added to the terms, 'privileges, and immunities,' are comprehended all the things of which courts can take cognizance." *Id.* at 88 (Storm)

"The first section of this bill was designed by its author, and will be construed by federal courts, as transferring all actions of law and suits in equity and all offenses against the person or property from the state to the federal courts." *Id.* at 91 (Duke)

Finally, the debates leave no doubt that the federal courts were being authorized to provide "redress," the express language of Section 1, to persons whose rights, privileges, and immunities secured by the Constitution were violated under color of state law.

"This Act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed . . . As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people." *Id.* at App. 68 (Shellabarger)

"But the chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them. Whenever such a state of facts is clearly made out, I believe the last clause of the first

section empowers Congress to step in and provide for doing *justice* to those persons who are thus denied equal protection." (Emphasis added.) *Id.* at 153 (Garfield)

"I now come to the question of constitutionality: 1. whether or not Congress may provide for *redress* in the Federal courts for infringements or deprivations of rights under the Constitution and laws of the United States.

* * *

"It is clear that rights, privileges, and immunities under the Constitution and laws of the United States are proper subjects for the *jurisdiction* of the Federal courts." (Emphasis added.) *Id.* at App. 79 (Perry)

"1. Afford an injured party *redress* in the United States courts against any person violating his rights as a citizen under claim or color of state authority." *Id.* at App. 313 (Burchard) (Emphasis added.)

"As to the civil remedies for a violation of these privileges . . . the injured party should have an original action in our Federal courts so that by *injunction* or the recovery of damages he could have relief. . . ." Cong. Globe, 42nd Cong., 1st Sess. at 501. (Senator Frelinghuysen) (Emphasis added.)

In summary, then, there can be no doubt that the Congress in 1871 fully intended that Section 1 was designed to provide complete redress in the federal courts to persons whose constitutional rights were violated by the State acting through its officers. As stated in *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961), Section 1 had

"three main aims. *First*, it might, of course, override certain kinds of state laws. . . . *Second*, it provided a remedy where state law was inadequate. . . . The *third* aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."

* * *

"It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts." *Id.* at 180.

* * *

"Opponents of the Act, however, did not fail to note that by virtue of §1 federal courts would sit in judgment on the misdeeds of state officers." *Id.* at 182.

Now, then, the question must be asked: what about the Eleventh Amendment to the United States Constitution? First, not once was the Eleventh Amendment mentioned throughout the entire debates on the Civil Rights Act of 1871 by any congressman, including the opponents who raised every conceivable constitutional objection. This is strongly supportive of either the conclusion that no one considered the Eleventh Amendment applicable to suits by a citizen of a state against either his own State, or the officers thereof, or that whatever immunity from suit states enjoyed, Congress had the power, and was exercising that power, to override that immunity from suit in federal courts.

Second, any suggestion that a state officer might insulate his actions from federal court scrutiny under the mantle of "states' rights" or the sovereign immunity of states must be placed in the context of the Reconstruction Era. See generally, H. Flack, *The Adoption of the Fourteenth Amendment* (1908); J.

TenBrock, *The Anti-Slavery Origins of the Fourteenth Amendment* (1951).

> " 'Sensitiveness to 'states' rights,' fear of rivalry with state courts and respect for state sentiment were swept aside by the great impulse of national feeling borne of the Civil War. Nationalism was triumphant; in national administration was sought its vindication. The new exertions of federal power were no longer trusted to the enforcement of state agencies.' Frankfurter and Landis, The Business of the Supreme Court, 64 (1928)" *Steffel v. Thompson*, ____ S. Ct. ____ n. 13 (1974)

> "The mischievous doctrine of state sovereignty . . . is still the doctrine of the unreconstructed rebels of the South and the Democratic party of the North, as appears from this debate." 42nd Cong., 1st Sess. at 487 (Tyler)

See also, Zwickler v. Koota, 389 U.S. 245 (1967); *Mitchum v. Foster*, 407 U.S. 225 (1972).

Against this historical background must be tested Justice Rehnquist's statement that

> "it has not heretofore been suggested that §1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself." *Edelman v. Jordan*, ____ U.S. ____ (1974) (Slip Op. at 24-25)

On the contrary, the notion that a state officer sued under Section 1983 could claim the immunity of the State under the Eleventh Amendment is so totally at odds with the original understanding of that section, and the contemporary history, that the members of the majority must re-examine their position.

II.

THE RELATIONSHIP BETWEEN THE FOURTEENTH AMENDMENT AND THE ELEVENTH AMENDMENT MUST BE CONFRONTED IN THIS CASE BECAUSE THE ACTIONS OF THE DEFENDANTS HEREIN WERE IN VIOLATION OF THE FOURTEENTH AMENDMENT.

In re-examining this issue this Court must focus on Section 5 of the Fourteenth Amendment which provides:

> "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

There can be no doubt that pursuant to this Section 5, Congress is empowered to provide for suits in the federal courts to enforce the Fourteenth Amendment against states and state officers acting on behalf of states notwithstanding the Eleventh Amendment. *Suing the State Under Title VII in the Face of The Eleventh Amendment*, 1973 Wis. L. Rev. 1099, 1111-1123 (1973); *see Katzenbach v. Morgan*, 384 U.S. 641 (1966). And that is precisely what Section 1983 does.

The next question to be considered is whether it is significant that in the instant case there has only been a finding that the actions of the state defendants were contrary to the Social Security Act, and thereby in contravention of the Supremacy Clause of the U.S. Constitution (*Hagans v. Lavine*, _____ U.S. _____ (March 25, 1974), and not a denial of equal protection or due process as guaranteed by the Fourteenth Amendment. As Justice Marshall indicated, *Edelman v. Jordan*, _____ U.S. _____ n.2 (1974) (Slip Op. at 6-7) (dissenting opinion), the majority did not reach the question of whether the Fourteenth Amendment limited the applicability of the Eleventh Amendment.

However, the relationship between the Fourteenth Amendment and the Eleventh Amendment must be confronted in this case because the actions of the defendants in this case were in violation of the Fourteenth Amendment to the United States Constitution.

The second sentence of Section 1 of the Fourteenth Amendment reads:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Since the *Slaughterhouse Cases,* 16 Wall. (83 U.S.) 36 (1873), this provision has been interpreted as protecting those rights of citizens "which owe their existence to the Federal government, its national character, its Constitution, or its laws." *Id.* at 79. Certainly, foremost among these privileges and immunities of national citizenship is the primacy of federal laws embodied in the Supremacy Clause of the United States Constitution. As the dissent by Justice Field recognized, the interpretation by the majority of the "privileges and immunities" clause of the Fourteenth Amendment resulted in, at the very least, a re-assertion that state laws must give way to the primacy of federal laws as guaranteed by the Supremacy Clause.

> "If this inhibition . . . only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States . . . no state could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the constitution and the laws of the United States always controlled any state legislation of that character." *Id.* at 96.

Thus, it was understood by both the majority and the dissenting judges in the *Slaughterhouse Cases*, that the majority's interpretation of the "privileges and immunities" clause of the Fourteenth Amendment meant that the enactment of state laws in contravention of federal laws were a violation of the rights of citizens under both the Fourteenth Amendment and the Supremacy Clause. Thus, in this case, when the Director of the Illinois Department of Public Aid promulgated a statewide regulation in violation of the Social Security Act, he abridged John Jordan's privileges and immunities guaranteed by the Fourteenth Amendment and the Supremacy Clause. As recognized in *Hagans v. Lavine*, ____ S. Ct. ____ (March 25, 1974), such a claim "although denominated 'statutory,' is in reality a constitutional claim arising under the Supremacy Clause."

Moreover, as this Court recognized in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), Section Five of the Fourteenth Amendment granted Congress discretion to decide what laws were appropriate to secure the amendment's guarantees. In this case, Congress, in enacting Section 1 of the Civil Rights Act of 1871, deemed it necessary to provide for a federal cause of action in the federal courts for persons who were deprived of rights secured by the United States Constitution, including certainly the Supremacy Clause of the United States Constitution. In essence, Section 1 was designed to enforce the entire Constitution, and to provide a remedy in federal courts therefor. To vindicate the supremacy of federal laws was a paramount objective of the Radical Republicans, and the federal judiciary was entrusted with that responsibility.

> "We must remember that it was states' rights, perverted I admit from their true significance, that

> arrayed themselves against the nation and threatened its existence. . . . Federal laws and Federal rights must be protected whether domestic laws are interfered with or not, because the Constitution and the laws made in pursuance thereof are the supreme law of the land." 42nd Cong., 1st Sess. at 502 (Frelinghuysen)

In conclusion, then, it is submitted that this Court must resolve in this case, the relationship between the Fourteenth Amendment and the powers granted Congress in Section 5 of that Amendment, and the Eleventh Amendment.

Lastly, if this Court considers a violation of the Supremacy Clause not to be a violation of the privileges and immunities clause of the Fourteenth Amendment, any distinction between violations of the Fourteenth Amendment, and other constitutional violations, in particular Supremacy Clause violations, would force lower courts to decide Fourteenth Amendment issues in all cases, contrary to the established doctrine that Supremacy Clause claims should be "decided first and the former not reached if the statutory claim [Supremacy Clause] was dispositive. *California Human Resources Department v. Java*, 402 U.S. 121, 124 (1971); *Dandridge v. Williams, supra*, 397 U.S. at 475-476; *Rosado v. Wyman, supra*, 397 U.S. at 402; *King v. Smith, supra.*" *Hagans v. Lavine*, ____ U.S. ____ , 42 U.S.L.W. at 4386 (March 25, 1974). For example, in this case, if the majority opinion is not altered, the plaintiffs, on remand, will have to litigate their claim that the actions of the defendants were in violation of the equal protection clause of the Fourteenth Amendment. Such a result is neither a sound contribution to the efficient administration of justice, nor consistent with established principles of constitutional law.

III.

THE RELIEF UPHELD IN EX PARTE YOUNG WAS NOT "PROSPECTIVE ONLY" AS STATED IN THE MAJORITY OPINION

The majority opinion relies almost exclusively on the authority of *Ex Parte Young* to support its holding that prospective relief against state officers is not barred by the Eleventh Amendment, but retrospective relief to those persons who are actually injured by the illegal actions of state officers is barred by the Eleventh Amendment. The majority opinion states:

> "But the relief awarded in *Ex Parte Young* was prospective only; the Attorney General was enjoined to conform his future conduct of that office to the requirements of the Fourteenth Amendment."

This reading of *Ex Parte Young* overlooks the fact that the relief entered by the Court of Appeals was both prospective and retrospective in nature, and that the majority opinion in *Ex Parte Young* expressly approved of earlier decisions granting retrospective relief. The facts of *Ex Parte Young* were that the federal court first issued a temporary restraining order and later a preliminary injunction enjoining the defendant from enforcing the allegedly confiscatory rates set by statute. The day after the preliminary injunction was issued, Young sued in state court for a writ of mandamus against the railroads to compel them to comply with the new law. He was adjudged guilty of contempt by the Court of Appeals for this action, fined $100 and ordered to jail until he dismissed the state mandamus proceeding. Young then applied to the Supreme Court for a writ of habeas corpus to free him from the custody of the marshal, and also for leave to file a

petition for writ of certiorari. As the Supreme Court stated in its opinion, "The case involves the validity of the order of the Circuit committing him for contempt." *Ex Parte Young* at 126-127. The contempt order, then, involved not just prospective relief, but indeed required Young in his official capacity to take action dismissing the mandamus proceeding in state court previously filed. Such relief is clearly retrospective in nature. The ultimate decision of the Court upholding the contempt order is clear authority that the Court in *Ex Parte Young* did not believe there were any distinctions between prospective or retrospective relief vis-a-vis the Eleventh Amendment when state officers were acting in contravention of federal law.

Further support for this conclusion is found in the portion of the opinion of the majority in *Ex Parte Young* relying on the earlier case of *Osborn v. Bank of United States.*

> "[T]he only difference in regard to the case of *Osborn* and the case in hand being that in this case the injury complained of is the threatened commencement of suits, civil or criminal, to enforce the act, instead of, as in the *Osborn* case, an actual and direct trespass upon or interference with tangible property. A bill filed to prevent the commencement of suits to enforce an unconstitutional act, under the circumstances already mentioned, is no new invention, as we have already seen. The difference between an actual and direct interference with tangible property and the enjoining of state officers from enforcing an unconstitutional act is not of a radical nature and does not extend, in truth, the jurisdiction of the courts over the subject matter. In the case of the interference with property, the person enjoined is assuming to act in his capacity as an official of the

state, and justification for his interference is claimed by reason of his position as a state official. Such official cannot so justify when acting under an unconstitutional enactment of the legislature. So, when the state official, instead of directly interfering with tangible property, is about to commence suits which have for their object the enforcement of an act which violates the Federal Constitution, to the great and irreparable injury of the complainants, he is seeking the same justification for the authority of the state as in other cases. The sovereignty of the state is, in reality, no more involved in one case than in the other. The state cannot, in either case, impart to the official immunity from responsibility to the supreme authority of the United States." *Ex Parte Young* at 167.

Thus, the reliance by this Court on the decision in *Ex Parte Young* for its distinction between prospective and retrospective relief is misplaced. On the contrary, the rationale, the facts, and the holding of *Ex Parte Young* clearly support the principle that the federal courts may grant appropriate relief to plaintiffs who are injured by illegal actions of state officers in contravention of federal law.[3]

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[3]The Court's statement that "were we to uphold this [retrospective] portion of the District Court's decree, we would be obligated to overrule the Court's holding in *Ford Motor Co. v. Dept. of Treasury, supra*," overlooks the principle of that case, and the other tax cases of the 1940's. As stated in *Steffel v. Thompson*, ____ U.S. ____ (March 20, 1974), those cases involved situations

> "in which principles of federalism militated altogether against federal intervention into a class of adjudications. See *Great Lakes Co. v. Huffman*, 319 U.S. 293 (1943)

IV.

BASED ON ILLINOIS LAW AN ORDER FOR RETROACTIVE PAYMENTS WOULD NOT REDUCE THE FIXED APPROPRIATION FOR PUBLIC AID.

Absent the authority of *Ex Parte Young*, the only reason presented in the majority opinion for the prospective/retrospective distinction is found in footnote 11. There, the Courts asserts that the financial impact of prospective relief and retrospective relief is different because of

> "the fact that where the state has a definable allocation to be used in the payment of public aid benefits, and pursues a certain course of action such as the processing of applications within certain time periods as did Illinois here, the subsequent ordering by a federal court of retroactive payments to correct delays in such processing will invariably mean there is less money available for payments for the continuing obligations of the public aid system."

This assertion of fact, however, is plainly erroneous in Illinois. Indeed exactly the opposite is true. Prospective mandatory injunctive relief requires additional allocation of funds out of current appropriations and will result in less money available for payments for the continuing obligations of the public

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(federal policy against interfering with the enforcement of state tax laws);[20]

[20]In *Great Lakes Co. v. Huffman* . . . the Court, recognizing the unique effects of anticipatory adjudication on tax administration, held that declaratory relief should be withheld when the taxpayer was provided an opportunity to maintain a refund suit after payment of the disputed tax. . . ."

aid system. On the other hand, any judgment for back benefits, if obtainable at all, would not be imposed upon the "definable allocation" of current appropriations. Instead, according to the Director of the Illinois Department of Public Aid (Pet. Br. at 34-36) since such relief would relate to the period when the appropriations had lapsed (Ill. Rev. Stat., ch. 127, §161), payments of these funds would have to be made from a special annual appropriation.

> "The General Assembly hereby creates the Court of Claims Fund and shall make annual appropriations thereto from which the Court may direct immediate payment of: (a) all claims arising solely as a result of the lapsing of an appropriation out of which the obligation could have been paid." Ill. Rev. Stat., ch. 37, §439.24 (1973)

In other words, the retroactive benefits awarded by the District Court in this case, if they may be secured at all, would ultimately be paid from a special appropriation which would not in any way reduce the amount of money available out of the current appropriation.

V.

THE PLAINTIFFS IN THIS CASE HAVE NO MEANS OF ENFORCING THEIR 1983 CLAIM IN THE STATE COURTS OF ILLINOIS.

Moreover, there is serious doubt whether the plaintiff class may bring their 1983 claim in the state courts. There is no provision for bringing claims based on violations of federal law in the Illinois Court of Claims. Ill. Rev. Stat., ch. 37, §439.8. And in *Chicago Welfare Rights Organ. v. Edelman*, 56 Ill. 2d 33, 305 N.E. 2d 140 (1973) (appeal docketed in the Supreme Court, No. 73-1386), the Illinois Supreme Court held that a 1983 claim may not be brought in the state courts, or,

at best, that such claim may only be brought pursuant to administrative remedies under the Illinois Administrative Review Act, Ill. Rev. Stat., ch. 110, §264 *et seq.* Under the latter interpretation, plaintiffs would only be able to proceed individually; there is no authority for proceeding as a class under the Illinois Public Aid Code, ch. 23, §11-8 and the Illinois Administrative Review Act, *supra.* Thus the members of the plaintiff class have no remedy in the Illinois courts, and this Court's decision deprives them of a remedy in the federal courts. Under these circumstances, plaintiffs are denied their rights to due process and equal protection of the laws guaranteed by the Fourteenth Amendment. See *General Oil v. Crain,* 209 U.S. 211, 226-27 (1908). Accordingly, it is submitted that this Court should grant this petition for rehearing and set this cause for re-argument in conjunction with the appeal in *Chicago Welfare Rights Organization v. Edelman,* No. 73-1386.

CONCLUSION

For all of the foregoing reasons, the plaintiffs urge this Court to grant the petition for rehearing.

Respectfully submitted,

SHELDON ROODMAN
Legal Assistance Foundation
of Chicago
64 East Jackson Boulevard
Chicago, Illinois 60604
(312) 922-5625
Attorney for Plaintiffs-Petitioners

April 16, 1974

CERTIFICATE OF COUNSEL

I, SHELDON ROODMAN, attorney for the plaintiffs-petitioners, certify that this Petition is presented in good faith and not for purposes of delay.

SHELDON ROODMAN

EDELMAN, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS *v.* JORDAN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 72-1410. Argued December 12, 1973—Decided March 25, 1974

Respondent brought this class action for injunctive and declaratory relief against the Illinois officials administering the federal-state programs of Aid to the Aged, Blind, and Disabled (AABD), which are funded equally by the State and Federal Governments, contending that they were violating federal law and denying equal protection of the laws by following state regulations that did not comply with the federal time limits within which participating States had to process and make grants with respect to AABD applications. The District Court by a permanent injunction required compliance with the federal time limits and also ordered the state officials to release and remit AABD benefits wrongfully withheld to all persons found eligible who had applied therefor between July 1, 1968, the date of the federal regulations, and April 16, 1971, the date of the court's preliminary injunction. The Court of Appeals affirmed, rejecting the state officials' contentions that the Eleventh Amendment barred the award of the retroactive benefits and that the judgment of inconsistency between federal regulations and state provisions could be given only prospective effect. *Held:* The Eleventh Amendment of the Constitution bars that portion of the District Court's decree that ordered retroactive payment of benefits. Pp. 658-678.

(a) A suit by private parties seeking to impose a liability payable from public funds in the state treasury is foreclosed by the Amendment if the State does not consent to suit. Pp. 662-663.

(b) The Court of Appeals erred in holding that *Ex parte Young*, 209 U. S. 123, which awarded only prospective relief, did not preclude the retroactive monetary award here on the ground that it was an "equitable restitution," since that award, though on its face directed against the state official individually, as a practical matter could be satisfied only from the general revenues of the State and was indistinguishable from an award of damages against the State. *Ford Motor Co.* v. *Department of Treasury*,

323 U. S. 459, followed. *Shapiro* v. *Thompson*, 394 U. S. 618; *State Dept. of Health and Rehabilitation Services* v. *Zarate*, 407 U. S. 918; *Sterrett* v. *Mothers' & Children's Rights Organization*, 409 U. S. 809; *Wyman* v. *Bowens*, 397 U. S. 49, disapproved to extent that their holdings do not comport with the holding in the instant case on the Eleventh Amendment issue. Pp. 663–671.

(c) The State of Illinois did not waive its Eleventh Amendment immunity and consent to the bringing of respondent's suit by participating in the federal AABD program. *Parden* v. *Terminal R. Co.*, 377 U. S. 184, and *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, distinguished. Nor does the mere fact that a State participates in a program partially funded by the Federal Government manifest consent by the State to be sued in federal courts. Pp. 671–674.

(d) The Court of Appeals properly considered the Eleventh Amendment defense, which the state officials did not assert in the District Court, since that defense partakes of the nature of a jurisdictional bar. *Ford Motor Co.* v. *Department of Treasury*, *supra*. Pp. 677–678.

472 F. 2d 985, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and POWELL, JJ., joined. DOUGLAS, J., *post*, p. 678, and BRENNAN, J., *post*, p. 687, filed dissenting opinions. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 688.

Robert J. O'Rourke, Deputy Attorney General of Illinois, argued the cause for petitioner. On the briefs were *William J. Scott*, Attorney General, and *Donald S. Carnow*, Special Assistant Attorney General.

Sheldon Roodman argued the cause and filed a brief for respondent.*

*Briefs of *amici curiae* urging affirmance were filed by *Jack Greenberg*, *Charles Stephen Ralston*, and *Eric Schnapper* for the NAACP Legal Defense and Educational Fund, Inc., and by *Nancy Duff Levy* and *Henry A. Freedman* for the NLSP Center on Social Welfare Policy and Law, Inc.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent John Jordan filed a complaint in the United States District Court for the Northern District of Illinois, individually and as a representative of a class, seeking declaratory and injunctive relief against two former directors of the Illinois Department of Public Aid, the director of the Cook County Department of Public Aid, and the comptroller of Cook County. Respondent alleged that these state officials were administering the federal-state programs of Aid to the Aged, Blind, or Disabled (AABD) in a manner inconsistent with various federal regulations and with the Fourteenth Amendment to the Constitution.[1]

AABD is one of the categorical aid programs administered by the Illinois Department of Public Aid pursuant to the Illinois Public Aid Code, Ill. Rev. Stat., c. 23, §§ 3–1 through 3–12 (1973). Under the Social Security Act, the program is funded equally by the State and the Federal Governments. 42 U. S. C. §§ 1382–1385 (1964 ed., Supp. V).[2] The Department of Health, Education, and

[1] In his complaint in the District Court, respondent claimed that the Illinois Department of Public Aid was not complying with federal regulations in its processing of public aid applications, and also that its refusal to process and allow respondent's claim for a period of four months, while processing and allowing the claims of those similarly situated, violated the Equal Protection Clause of the Fourteenth Amendment. Respondent asserted that the District Court could exercise jurisdiction over the cause by virtue of 28 U. S. C. §§ 1331 and 1343 (3) and (4). Though not briefed by the parties before this Court, we think that under our decision in *Hagans* v. *Lavine*, *ante*, p. 528, the equal protection claim cannot be said to be "wholly insubstantial," and that therefore the District Court was correct in exercising pendent jurisdiction over the statutory claim.

[2] Effective January 1, 1974, this AABD program was replaced by a similar program. See 42 U. S. C. §§ 801–805 (1970 ed., Supp. II).

Welfare (HEW), which administers these payments for the Federal Government, issued regulations prescribing maximum permissible time standards within which States participating in the program had to process AABD applications. Those regulations, originally issued in 1968, required, at the time of the institution of this suit, that eligibility determinations must be made by the States within 30 days of receipt of applications for aid to the aged and blind, and within 45 days of receipt of applications for aid to the disabled. For those persons found eligible, the assistance check was required to be received by them within the applicable time period. 45 CFR § 206.10 (a)(3).[3]

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[3] Title 45 CFR § 206.10 (a)(3) (1973) provides in pertinent part: "(a) *State plan requirements.* A State plan . . . shall provide that:

. . . . . .

"(3) A decision shall be made promptly on applications, pursuant to reasonable State-established time standards not in excess of:

"(i) 45 days [for aid to aged and blind] . . . ; and

"(ii) 60 days . . . [for aid to disabled].

"Under this requirement, the applicant is informed of the agency's time standard in acting on applications, which covers the time from date of application under the State plan to the date that the assistance check, or notification of denial of assistance or change of award, or the eligibility decision with respect to medical assistance, is mailed to the applicant or recipient. . . ."

When originally issued in 1968 the regulations provided that the applications for aid to the aged and blind be processed within 30 days and that aid to the disabled be processed within 45 days of receipt. They also provided that the person determined to be eligible must *receive* his assistance check within the applicable time period. The amendment to 60 days for aid to the disabled occurred in 1971, as did the change to require mailing instead of receipt of the assistance check within the applicable time period; effective Oct. 15, 1973, the time for processing aged and blind applications became 45 days.

In addition, at the time of institution of the suit, 45 CFR § 206.10 (a)(6) (1972) provided in pertinent part:

During the period in which the federal regulations went into effect, Illinois public aid officials were administering the benefits pursuant to their own regulations as provided in the Categorical Assistance Manual of the Illinois Department of Public Aid.[4] Respondent's complaint charged that the Illinois defendants, operating under those regulations, were improperly authorizing grants to commence only with the month in which an application was approved and not including prior eligibility months for which an applicant was entitled to aid under federal law. The complaint also alleged that the Illinois defendants were not processing the applications within the applicable time requirements of the federal regulations; specifically, respondent alleged that his own application

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"(6) Entitlement will begin as specified in the State plan, which (i) for financial assistance must be no later than the date of authorization of payment . . . ."

[4] The Illinois regulations, found in the Illinois Categorical Assistance Manual of the Illinois Department of Public Aid, provide in pertinent part:

"4004.1

"Except for [disability] cases which have a time standard of 45 days, the time standard for disposition of applications is 30 days from the date of application to the date the applicants are determined eligible and the effective date of their first assistance or are determined ineligible and receive a notice of denial of assistance. . . .

. . . . . .

"8255. Initial Awards

"Initial awards may be new grants, reinstatements, or certain types of resumptions. They can be effective for the month in which Form FO–550 is signed but for no prior period except [under conditions not relevant to this case].

"8255.1 New Grants

"A new grant is the first grant authorized after an application has been accepted in a case which has not previously received assistance under the same assistance program. It may be authorized for the month in which Form FO–550 is signed but not for any prior period unless it meets [exceptions not relevant to this case]."

for disability benefits was not acted on by the Illlinois Department of Public Aid for almost four months. Such actions of the Illinois officials were alleged to violate federal law and deny the equal protection of the laws. Respondent's prayer requested declaratory and injunctive relief, and specifically requested "a permanent injunction enjoining the defendants to award to the entire class of plaintiffs all AABD benefits wrongfully withheld."

In its judgment of March 15, 1972, the District Court declared § 4004 of the Illinois Manual to be invalid insofar as it was inconsistent with the federal regulations found in 45 CFR § 206.10 (a)(3), and granted a permanent injunction requiring compliance with the federal time limits for processing and paying AABD applicants. The District Court, in paragraph 5 of its judgment, also ordered the state officials to "release and remit AABD benefits wrongfully withheld to all applicants for AABD in the State of Illinois who applied between July 1, 1968 [the date of the federal regulations] and April 16, 197[1] [the date of the preliminary injunction issued by the District Court] and were determined eligible . . . ." [5]

[5] Paragraph 5 of the District Court's judgment provided:

"That the defendant EDWARD T. WEAVER, Director, Illinois Department of Public Aid, his agents, including all of the County Departments of Public Aid in the State of Illinois, and employees, and all persons in active concert and participation with them, are hereby enjoined to release and remit AABD benefits wrongfully withheld to all applicants for AABD in the State of Illlinois who applied between July 1, 1968 and April 16, 1972 [*sic*] [should read "1971"], and were determined eligible, as follows:

"(a) For those aged and blind applicants whose first full AABD check was not mailed within thirty days from the date of application, AABD assistance for the period beginning with the thirtieth day from the date of application to the date the applicant's entitlement to AABD became effective;

"(b)(i) For those disabled applicants who applied between July 1, 1968 and December 31, 1970, whose first full AABD check was not

On appeal to the United States Court of Appeals for the Seventh Circuit, the Illinois officials contended, *inter alia*, that the Eleventh Amendment barred the award of

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mailed within forty-five days from the date of application, AABD assistance for the period beginning with the forty-fifth day from the date of application to the date the applicant's entitlement became effective;

"(ii) For those disabled applicants who applied between January 1, 1971 and April 16, 1971, whose first full AABD check was not mailed within sixty days from the date of application, AABD assistance for the period beginning with the sixtieth day from the date of application to the date the applicant's entitlement became effective.

"These AABD benefits shall be mailed to those persons currently receiving AABD within eight months with an explanatory letter, said letter having been first approved by plaintiffs' attorney. Any AABD benefits received pursuant to this paragraph shall not be deemed income or resources under Article III of the Illinois Public Aid Code.

"For those persons not presently receiving AABD:

"(a) A certified letter (return receipt requested), said letter having been first approved by plaintiffs' attorney, shall be sent to the last known address of the person, informing him in concise and easily understandable terms that he is entitled to a specified amount of AABD benefits wrongfully withheld, and that he may claim such amount by contacting the County Department of Public Aid at a specified address, within 45 days from the receipt of said letter.

"(b) If the County Department of Public Aid does not receive a claim for the AABD benefits within 45 days from the date of actual notice to the person, the right to said AABD benefits shall be forfeited and the file shall be closed. Persons who do not receive actual notice do not forfeit their rights to AABD benefits wrongfully withheld under this provision."

Paragraph 6 of the District Court's judgment provided:

"Within 15 days from the date of this decree, defendant EDWARD T. WEAVER, Director, Illlinois Department of Public Aid, shall submit to the court and the plaintiffs' attorney a detailed statement as to the method for effectuating the relief required by paragraph 5, supra, of this Decree. Any disputes between the parties as to whether the procedures and steps outlined by the

retroactive benefits, that the judgment of inconsistency between the federal regulations and the provisions of the Illinois Categorical Assistance Manual could be given prospective effect only, and that the federal regulations in question were inconsistent with the Social Security Act itself. The Court of Appeals rejected these contentions and affirmed the judgment of the District Court. *Jordan* v. *Weaver*, 472 F. 2d 985 (1973).[6] Because of an apparent conflict on the Eleventh Amendment issue with the decision of the Court of Appeals for the Second Circuit in *Rothstein* v. *Wyman*, 467 F. 2d 226 (1972), cert. denied, 411 U. S. 921 (1973), we granted the petition for certiorari filed by petitioner Joel Edelman, who is the present Director of the Illinois Department of Public Aid, and successor to the former directors sued below. 412 U. S. 937 (1973). The petition for certiorari raised the same contentions urged by the petitioner in the Court of Appeals.[7] Because we believe the Court of Appeals

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defendant WEAVER will fulfill the requirements of this Decree will be resolved by the Court."

On July 19, 1973, the author of this opinion stayed until further order of this Court these two paragraphs of the District Court's judgment. 414 U. S. 1301.

[6] Respondent appealed from the District Court's judgment insofar as it held him not entitled to receive benefits from the date of his applications (as opposed to the date of authorization of benefits as provided by the federal regulations) and insofar as it failed to award punitive damages. The Court of Appeals upheld the District Court's decision against respondent on those points and they are not at issue here. 472 F. 2d 985, 997–999.

[7] Citing *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971), petitioner also contends in this Court that the Court of Appeals erred in refusing to give the District Court's judgment prospective effect only. Brief for Petitioner 37, incorporating arguments made in Petition for Certiorari 18–22. The Court of Appeals concluded that this ground was "not presented to the district judge before the entry of judgment, so that it comes too late." 472 F. 2d, at 995. The Court of Appeals went on, however, to conclude that "[e]ven if the

erred in its disposition of the Eleventh Amendment claim, we reverse that portion of the Court of Appeals decision which affirmed the District Court's order that retroactive benefits be paid by the Illinois state officials.[8]

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ground had been timely presented, defendants' contention would be meritless." *Ibid.* Noting that one of three tests established by our decision in *Huson* for determining the retroactivity of court decisions was that "the decision to be applied nonretroactively *must* establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or [have decided] an issue of first impression whose resolution was not clearly foreshadowed . . . ," *Chevron Oil Co.* v. *Huson*, *supra*, at 106, the Court of Appeals found that the petitioner had not satisfied this test, since the "federal time requirements for processing applications and paying eligible AABD applicants were made effective July 1, 1968, and defendants were well aware of these mandatory maximum permissible time standards." 472 F. 2d, at 996.

In light of our disposition of this case on the Eleventh Amendment issue we see no reason to address this contention.

[8] Title 42 U. S. C. § 1382 (a)(8) (1970 ed., Supp. II) provided in pertinent part:

"(a) Contents.

"A State plan for aid to the aged, blind, or disabled, or for aid to the aged, blind, or disabled and medical assistance for the aged, must—

. . . . . .

"(8) provide that all individuals wishing to make application for aid or assistance under the plan shall have opportunity to do so, and that such aid or assistance shall be furnished with reasonable promptness to all eligible individuals."

HEW, pursuant to authority granted to it by 42 U. S. C. § 1302, has promulgated regulations, see n. 3, *supra*, which require that decisions be made promptly on applications within 45 days for the aged and blind and within 60 days for the disabled, and that initiation of payments to the eligible be made within the same periods. Petitioner renews in this Court the contention made in the Court of Appeals that these time limitations in the regulations are inconsistent with the statute and therefore an unlawful abuse of the rulemaking authority. Brief for Petitioner 37, incorporating arguments made in Petition for Certiorari 22–28. Specifically, petitioner argues

The historical basis of the Eleventh Amendment has been oft stated, and it represents one of the more dramatic examples of this Court's effort to derive meaning from the document given to the Nation by the Framers nearly 200 years ago. A leading historian of the Court tells us:

> "The right of the Federal Judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject of deep apprehension and of active debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new Federal Government, and it was largely owing to their successful dissipation of the fear of the existence of such Federal power that the Constitution was finally adopted." 1 C. Warren, The Supreme Court in United States History 91 (rev. ed. 1937).

Despite such disclaimers,[9] the very first suit entered

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that the "establishment of arbitrary [forty-five] and sixty day maximums in the HEW regulations for determination of eligibility and initiation of payments without taking into consideration the efficient administration of the Act by the State agencies is inconsistent with the 'reasonable promptness' requirement and must therefore be declared unlawful . . . ." Pet. for Cert. 23. The Court of Appeals rejected this contention, holding that "these time requirements, binding on state welfare officials, are an appropriate interpretation of the Congressional mandate of 'reasonable promptness.'" 472 F. 2d, at 996. We agree with the Court of Appeals.

[9] While the debates of the Constitutional Convention themselves do not disclose a discussion of the question, the prevailing view at the time of the ratification of the Constitution was stated by various of the Framers in the writings and debates of the period. Examples of these views have been assembled by Mr. Chief Justice Hughes: ". . . Madison, in the Virginia Convention, answering objections to the ratification of the Constitution, clearly stated his view as to the purpose and effect of the provision conferring jurisdiction over

in this Court at its February Term in 1791 was brought against the State of Maryland by a firm of Dutch bankers as creditors. *Ibid.; Vanstophorst* v. *Maryland*, see 2 Dall.

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controversies between States of the Union and foreign States. That purpose was suitably to provide for adjudication in such cases if consent should be given but not otherwise. Madison said: 'The next case provides for disputes between a foreign state and one of our states, should such a case ever arise; and between a citizen and a foreign citizen or subject. I do not conceive that any controversy can ever be decided, in these courts, between an American state and a foreign state, without the consent of the parties. If they consent, provision is here made.' 3 Elliot's Debates, 533.

"Marshall, in the same Convention, expressed a similar view. Replying to an objection as to the admissibility of a suit by a foreign state, Marshall said: 'He objects, in the next place, to its jurisdiction in controversies between a state and a foreign state. Suppose, says he, in such a suit, a foreign state is cast; will she be bound by the decision? If a foreign state brought a suit against the commonwealth of Virginia, would she not be barred from the claim if the federal judiciary thought it unjust? The previous consent of the parties is necessary; and, as the federal judiciary will decide, each party will acquiesce.' 3 Elliot's Debates, 557.

"Hamilton, in The Federalist, No. 81, made the following emphatic statement of the general principle of immunity: 'It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation and need not be repeated here. A recurrence to the principles there established will satisfy us that there is no color to pretend that the State governments would by the adoption of that plan be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action

401. The subsequent year brought the institution of additional suits against other States, and caused considerable alarm and consternation in the country.

The issue was squarely presented to the Court in a suit brought at the August 1792 Term by two citizens of South Carolina, executors of a British creditor, against the State of Georgia. After a year's postponement for preparation on the part of the State of Georgia, the Court, after argument, rendered in February 1793, its short-lived decision in *Chisholm* v. *Georgia*, 2 Dall. 419. The decision in that case, that a State was liable to suit by a citizen of another State or of a foreign country, literally shocked the Nation. Sentiment for passage of a constitutional amendment to override the decision rapidly gained momentum, and five years after *Chisholm* the Eleventh Amendment was officially announced by President John Adams. Unchanged since then, the Amendment provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

While the Amendment by its terms does not bar suits against a State by its own citizens, this Court has con-

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independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident it could not be done without waging war against the contracting State; and to ascribe to the federal courts by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence would be altogether forced and unwarrantable.'" *Monaco* v. *Mississippi*, 292 U. S. 313, 323–325 (1934) (footnotes omitted).

sistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State. *Hans* v. *Louisiana*, 134 U. S. 1 (1890); *Duhne* v. *New Jersey*, 251 U. S. 311 (1920); *Great Northern Life Insurance Co.* v. *Read*, 322 U. S. 47 (1944); *Parden* v. *Terminal R. Co.*, 377 U. S. 184 (1964); *Employees* v. *Department of Public Health and Welfare*, 411 U. S. 279 (1973). It is also well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. In *Ford Motor Co.* v. *Department of Treasury*, 323 U. S. 459 (1945), the Court said:

> "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Id.*, at 464.

Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. *Great Northern Life Insurance Co.* v. *Read*, *supra*; *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U. S. 573 (1946).

The Court of Appeals in this case, while recognizing that the *Hans* line of cases permitted the State to raise the Eleventh Amendment as a defense to suit by its own citizens, nevertheless concluded that the Amendment did not bar the award of retroactive payments of the statutory benefits found to have been wrongfully withheld. The Court of Appeals held that the above-cited cases, when read in light of this Court's landmark decision in *Ex parte Young*, 209 U. S. 123 (1908), do not preclude

the grant of such a monetary award in the nature of equitable restitution.

Petitioner concedes that *Ex parte Young, supra,* is no bar to that part of the District Court's judgment that prospectively enjoined petitioner's predecessors from failing to process applications within the time limits established by the federal regulations. Petitioner argues, however, that *Ex parte Young* does not extend so far as to permit a suit which seeks the award of an accrued monetary liability which must be met from the general revenues of a State, absent consent or waiver by the State of its Eleventh Amendment immunity, and that therefore the award of retroactive benefits by the District Court was improper.

Ex parte Young was a watershed case in which this Court held that the Eleventh Amendment did not bar an action in the federal courts seeking to enjoin the Attorney General of Minnesota from enforcing a statute claimed to violate the Fourteenth Amendment of the United States Constitution. This holding has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect. But the relief awarded in *Ex parte Young* was prospective only; the Attorney General of Minnesota was enjoined to conform his future conduct of that office to the requirement of the Fourteenth Amendment. Such relief is analogous to that awarded by the District Court in the prospective portion of its order under review in this case.

But the retroactive portion of the District Court's order here, which requires the payment of a very substantial amount of money which that court held should have been paid, but was not, stands on quite a different footing. These funds will obviously not be paid out of the pocket of petitioner Edelman. Addressing himself to a similar situation in *Rothstein* v. *Wyman,* 467 F. 2d 226

(CA2 1972), cert. denied, 411 U. S. 921 (1973), Judge McGowan [10] observed for the court:

> "It is not pretended that these payments are to come from the personal resources of these appellants. Appellees expressly contemplate that they will, rather, involve substantial expenditures from the public funds of the state. . . .
>
> "It is one thing to tell the Commissioner of Social Services that he must comply with the federal standards for the future if the state is to have the benefit of federal funds in the programs he administers. It is quite another thing to order the Commissioner to use state funds to make reparation for the past. The latter would appear to us to fall afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force." *Id.*, at 236–237 (footnotes omitted).

We agree with Judge McGowan's observations. The funds to satisfy the award in this case must inevitably come from the general revenues of the State of Illinois, and thus the award resembles far more closely the monetary award against the State itself, *Ford Motor Co.* v. *Department of Treasury, supra,* than it does the prospective injunctive relief awarded in *Ex parte Young.*

The Court of Appeals, in upholding the award in this case, held that it was permissible because it was in the form of "equitable restitution" instead of damages, and therefore capable of being tailored in such a way as to minimize disruptions of the state program of categorical assistance. But we must judge the award actually made in this case, and not one which might have been differently tailored in a different case, and we must judge

[10] Of the Court of Appeals for the District of Columbia Circuit, sitting by designation on the Court of Appeals for the Second Circuit.

it in the context of the important constitutional principle embodied in the Eleventh Amendment.[11]

We do not read *Ex parte Young* or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled "equitable" in nature. The Court's opinion in *Ex parte Young* hewed to no such line. Its citation of *Hagood* v. *Southern*, 117 U. S. 52 (1886), and *In re Ayers*, 123 U. S. 443 (1887), which were both actions

[11] It may be true, as stated by our Brother DOUGLAS in dissent, that "[m]ost welfare decisions by federal courts have a financial impact on the States." *Post*, at 680–681. But we cannot agree that such a financial impact is the same where a federal court applies *Ex parte Young* to grant prospective declaratory and injunctive relief, as opposed to an order of retroactive payments as was made in the instant case. It is not necessarily true that "[w]hether the decree is prospective only or requires payments for the weeks or months wrongfully skipped over by the state officials, the nature of the impact on the state treasury is precisely the same." *Post*, at 682. This argument neglects the fact that where the State has a definable allocation to be used in the payment of public aid benefits, and pursues a certain course of action such as the processing of applications within certain time periods as did Illinois here, the subsequent ordering by a federal court of retroactive payments to correct delays in such processing will invariably mean there is less money available for payments for the continuing obligations of the public aid system.

As stated by Judge McGowan in *Rothstein* v. *Wyman*, 467 F. 2d 226, 235 (CA2 1972):

"The second federal policy which might arguably be furthered by retroactive payments is the fundamental goal of congressional welfare legislation—the satisfaction of the ascertained needs of impoverished persons. Federal standards are designed to ensure that those needs are equitably met; and there may perhaps be cases in which the *prompt* payment of funds wrongfully withheld will serve that end. As time goes by, however, retroactive payments become compensatory rather than remedial; the coincidence between previously ascertained and existing needs becomes less clear."

against state officers for specific performance of a contract to which the State was a party, demonstrate that equitable relief may be barred by the Eleventh Amendment.

As in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night. The injunction issued in *Ex parte Young* was not totally without effect on the State's revenues, since the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. Later cases from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex parte Young*. In *Graham* v. *Richardson*, 403 U. S. 365 (1971), Arizona and Pennsylvania welfare officials were prohibited from denying welfare benefits to otherwise qualified recipients who were aliens. In *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), New York City welfare officials were enjoined from following New York State procedures which authorized the termination of benefits paid to welfare recipients without prior hearing.[12] But the fiscal consequences to state

[12] The Court of Appeals considered the Court's decision in *Griffin* v. *School Board*, 377 U. S. 218 (1964), to be of like import. But as may be seen from *Griffin*'s citation of *Lincoln County* v. *Luning*, 133 U. S. 529 (1890), a county does not occupy the same position as a State for purposes of the Eleventh Amendment. See also *Moor* v. *County of Alameda*, 411 U. S. 693 (1973). The fact that the county policies executed by the county officials in *Griffin* were subject to the commands of the Fourteenth Amendment, but the county was not able to invoke the protection of the Eleventh Amendment, is no more than a recognition of the long-established rule that while county action is generally state action for purposes of the Fourteenth Amendment, a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment.

treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young, supra.*

But that portion of the District Court's decree which petitioner challenges on Eleventh Amendment grounds goes much further than any of the cases cited. It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard. While the Court of Appeals described this retroactive award of monetary relief as a form of "equitable restitution," it is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.

Were we to uphold this portion of the District Court's decree, we would be obligated to overrule the Court's holding in *Ford Motor Co.* v. *Department of Treasury, supra.* There a taxpayer, who had, under protest, paid taxes to the State of Indiana, sought a refund of those taxes from the Indiana state officials who were charged with their collection. The taxpayer claimed that the tax

had been imposed in violation of the United States Constitution. The term "equitable restitution" would seem even more applicable to the relief sought in that case, since the taxpayer had at one time had the money, and paid it over to the State pursuant to an allegedly unconstitutional tax exaction. Yet this Court had no hesitation in holding that the taxpayer's action was a suit against the State, and barred by the Eleventh Amendment. We reach a similar conclusion with respect to the retroactive portion of the relief awarded by the District Court in this case.

The Court of Appeals expressed the view that its conclusion on the Eleventh Amendment issue was supported by this Court's holding in *Department of Employment* v. *United States*, 385 U. S. 355 (1966). There the United States was held entitled to sue the Colorado Department of Employment in the United States District Court for refund of unemployment compensation taxes paid under protest by the American National Red Cross, an instrumentality of the United States. The discussion of the State's Eleventh Amendment claim is confined to the following sentence in the opinion:

> "With respect to appellants' contention that the State of Colorado has not consented to suit in a federal forum even where the plaintiff is the United States, see *Monaco* v. *Mississippi*, 292 U. S. 313 (1934), and *Ex parte Young*, 209 U. S. 123 (1908)." *Id.*, at 358.

Monaco v. *Mississippi*, 292 U. S. 313 (1934), reaffirmed the principle that the Eleventh Amendment was no bar to a suit by the United States against a State. *Id.*, at 329. In view of Mr. Chief Justice Hughes' vigorous reaffirmation in *Monaco* of the principles of the Eleventh Amendment and sovereign immunity, we think it unlikely that the Court in *Department of Employment* v. *United States*, in citing *Ex parte Young* as well as *Monaco*,

intended to foreshadow a departure from the rule to which we adhere today.

Three fairly recent District Court judgments requiring state directors of public aid to make the type of retroactive payment involved here have been summarily affirmed by this Court notwithstanding Eleventh Amendment contentions made by state officers who were appealing from the District Court judgment.[13] *Shapiro* v. *Thompson*, 394 U. S. 618 (1969), is the only instance in which the Eleventh Amendment objection to such retroactive relief was actually presented to this Court in a case which was orally argued. The three-judge District Court in that case had ordered the retroactive payment of welfare benefits found by that court to have been unlawfully withheld because of residence requirements held violative of equal protection. 270 F. Supp. 331, 338 n. 5 (Conn. 1967). This Court, while affirming the judgment, did not in its opinion refer to or substantively treat the Eleventh Amendment argument. Nor, of course, did the summary dispositions of the three District Court cases contain any substantive discussion of this or any other issues raised by the parties.

This case, therefore, is the first opportunity the Court has taken to fully explore and treat the Eleventh Amend-

[13] Brief for Respondent 15–18. Decisions of this Court in which we summarily affirmed a decision of a lower federal court which ordered the payment of retroactive awards and in which the jurisdictional statement filed in this Court raised the Eleventh Amendment defense include: *State Dept. of Health and Rehabilitative Services* v. *Zarate*, 407 U. S. 918 (1972), aff'g 347 F. Supp. 1004 (SD Fla. 1971); *Sterrett* v. *Mothers' and Children's Rights Organization*, 409 U. S. 809 (1972), aff'g unreported order and judgment of District Court (ND Ind. 1972) on remand from *Carpenter* v. *Sterrett*, 405 U. S. 971 (1972); *Gaddis* v. *Wyman*, 304 F. Supp. 717 (SDNY 1969) (order at CCH Poverty Law Rep. ¶ 10,506 [1968–1971 Transfer Binder]), aff'd *per curiam sub nom. Wyman* v. *Bowens*, 397 U. S. 49 (1970).

ment aspects of such relief in a written opinion. *Shapiro* v. *Thompson* and these three summary affirmances obviously are of precedential value in support of the contention that the Eleventh Amendment does not bar the relief awarded by the District Court in this case. Equally obviously, they are not of the same precedential value as would be an opinion of this Court treating the question on the merits. Since we deal with a constitutional question, we are less constrained by the principle of *stare decisis* than we are in other areas of the law.[14] Having now had an opportunity to more fully consider the Eleventh Amendment issue after briefing and argument, we disapprove the Eleventh Amendment holdings of those cases to the extent that they are inconsistent with our holding today.

The Court of Appeals held in the alternative that even if the Eleventh Amendment be deemed a bar to the retroactive relief awarded respondent in this case, the State of Illinois had waived its Eleventh Amendment immunity and consented to the bringing of such a suit by participating in the federal AABD program. The Court of Appeals relied upon our holdings in *Parden* v. *Terminal R. Co.*, 377 U. S. 184 (1964), and *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959),

[14] In the words of Mr. Justice Brandeis: "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406–408 (1932) (dissenting opinion) (footnotes omitted).

and on the dissenting opinion of Judge Bright in *Employees* v. *Department of Public Health and Welfare*, 452 F. 2d 820, 827 (CA8 1971). While the holding in the latter case was ultimately affirmed by this Court in *Employees* v. *Department of Public Health and Welfare*, 411 U. S. 279 (1973), we do not think that the answer to the waiver question turns on the distinction between *Parden, supra*, and *Employees, supra*. Both *Parden* and *Employees* involved a congressional enactment which by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included States or state instrumentalities. Similarly, *Petty* v. *Tennessee-Missouri Bridge Comm'n, supra*, involved congressional approval, pursuant to the Compact Clause, of a compact between Tennessee and Missouri, which provided that each compacting State would have the power "to contract, to sue, and be sued in its own name." The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity.

But in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent. Thus respondent is not only precluded from relying on this Court's holding in *Employees*, but on this Court's holdings in *Parden* and *Petty* as well.[15]

[15] Respondent urges that the traditionally broad power of a federal court sitting as a court of equity to fashion appropriate remedies as are necessary to effect congressional purposes requires that the District Court's award of retroactive benefits be upheld. Respondent places principal reliance on our prior decisions in *Porter* v. *Warner Holding Co.*, 328 U. S. 395 (1946), and *Mitchell* v. *DeMario Jewelry*, 361 U. S. 288 (1960). Both cases dealt with the

The Court of Appeals held that as a matter of federal law Illinois had "constructively consented" to this suit by participating in the federal AABD program and agreeing to administer federal and state funds in compliance with federal law. Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 171 (1909). We see no reason to retreat from the Court's statement in *Great Northern Insurance Co.* v. *Read*, 322 U. S., at 54 (footnote omitted):

> "[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found."

The mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts. And while this Court has, in cases such as *J. I. Case Co.* v. *Borak*, 377

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power of a federal court to grant equitable relief for violations of federal law; the decision in *Mitchell* indicated that a federal court could provide equitable relief "complete . . . in light of the statutory purposes." *Id.*, at 292. Since neither of these cases involved a suit against a State or a state official, it did not purport to decide the availability of equitable relief consistent with the Eleventh Amendment.

U. S. 426 (1964), authorized suits by one private party against another in order to effectuate a statutory purpose, it has never done so in the context of the Eleventh Amendment and a state defendant. Since *Employees, supra,* where Congress had expressly authorized suits against a general class of defendants and the only thing left to implication was whether the described class of defendants included States, was decided adversely to the putative plaintiffs on the waiver question, surely this respondent must also fail on that issue. The only language in the Social Security Act which purported to provide a federal sanction against a State which did not comply with federal requirements for the distribution of federal monies was found in former 42 U. S. C. § 1384 (now replaced by substantially similar provisions in 42 U. S. C. § 804), which provided for termination of future allocations of federal funds when a participating State failed to conform with federal law.[16] This provision by its terms did not authorize suit against anyone, and standing alone, fell far short of a waiver by a participating State of its Eleventh Amendment immunity.

Our Brother MARSHALL argues in dissent, and the Court of Appeals held, that although the Social Security Act itself does not create a private cause of action, the cause of action created by 42 U. S. C. § 1983, coupled with the enactment of the AABD program, and the issuance by HEW of regulations which require the States to make corrective payments after successful "fair hear-

[16] HEW sought passage of a bill in the 91st Congress, H. R. 16311, § 407 (a), which would have given it authority to require retroactive payments to eligible persons denied such benefits. The bill failed to pass the House of Representatives. See Staff of Senate Committee on Finance 91st Cong., 2d Sess., H. R. 16311, The Family Assistance Act of 1970, at C169–170 (Comm. Print Nov. 5, 1970).

ings" and provide for federal matching funds to satisfy federal court orders of retroactive payments, indicate that Congress intended a cause of action for public aid recipients such as respondent.[17] It is, of course, true that *Rosado* v. *Wyman*, 397 U. S. 397 (1970), held that suits in federal court under § 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States.[18] But it has not hereto-

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[17] Title 45 CFR §§ 205.10 (b)(2) and (3) provide:

"(b) *Federal financial participation.* Federal financial participation is available for the following items:

. . . . .

"(2) Payments of assistance made to carry out hearing decisions, or to take corrective action after an appeal but prior to hearing, or to extend the benefit of a hearing decision or court order to others in the same situation as those directly affected by the decision or order. Such payments may be retroactive in accordance with applicable Federal policies on corrective payments.

"(3) Payments of assistance within the scope of Federally aided public assistance programs made in accordance with a court order."

The Court of Appeals felt that § 1983, the enactment of the AABD program, and the issuance by HEW of the above regulation, indicated that Congress intended to include within the Social Security Act the remedy of "effective judicial review" and "the remedy of restoration of benefits withheld in violation of federal law." 472 F. 2d, at 994–995 and n. 15. But the adoption of regulations by HEW to permit the use of federal funds in the satisfaction of judicial awards is not determinative of the constitutional issues here presented.

[18] MR. JUSTICE MARSHALL, and both the Court of Appeals and the respondent herein, refer to language in *Rosado* v. *Wyman*, 397 U. S., 397, 420 (1970), to the effect that Congress in legislating the Social Security Act has not "closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." The Court in *Rosado* was concerned with the compatibility of a provision of New York law which decreased benefits to some eligible public aid recipients and amendments to the federal act which required cost-of-living increases. The case did not purport to

fore been suggested that § 1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that

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decide the Eleventh Amendment issue we resolve today. In finding the New York law inconsistent with the federal law, Mr. Justice Harlan stated:

"New York is, of course, in no way prohibited from using only *state* funds according to whatever plan it chooses, providing it violates no provision of the Constitution. It follows, however, from our conclusion that New York's program is incompatible with § 402 (a) (23), that petitioners are entitled to declaratory relief and an appropriate injunction by the District Court against the payment of *federal* monies according to the new schedules, should the State not develop a conforming plan within a reasonable period of time.

"We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements. We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program. . . . We adhere to *King* v. *Smith*, 392 U. S. 309 (1968), which implicitly rejected the argument that the statutory provisions for HEW review of plans should be read to curtail judicial relief and held Alabama's 'substitute father' regulation to be inconsistent with the federal statute. While *King* did not advert specifically to the remedial problem, the unarticulated premise was that the State had alternative choices of assuming the additional cost of paying benefits to families with substitute fathers or not using federal funds to pay welfare benefits according to a plan that was inconsistent with federal requirements." *Id.*, at 420–421.

Respondent urges that this language is "tantamount to a finding that Congress conditioned the participation of a state in the categorical assistance program on the forfeiture of immunity from suit in a federal forum . . . irrespective of the relief sought, [since] the intent of Congress remains constant." Brief for Respondent 42–43. Petitioner contends that this language, coupled with the fact that the Court in *Rosado* remanded the case to the District

section against state officers, rather than against the State itself. Though a § 1983 action may be instituted by public aid recipients such as respondent, a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, *Ex parte Young, supra,* and may not include a retroactive award which requires the payment of funds from the state treasury, *Ford Motor Co.* v. *Department of Treasury, supra.*

Respondent urges that since the various Illinois officials sued in the District Court failed to raise the Eleventh Amendment as a defense to the relief sought by respondent, petitioner is therefore barred [19] from raising the Eleventh Amendment defense in the Court of Appeals or in this Court. The Court of Appeals apparently felt the defense was properly presented, and dealt with it on the merits. We approve of this resolution, since it has been well settled since the decision

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Court to "afford New York an opportunity to revise its program . . . or, should New York choose [not to revise its program], issue its order restraining the further use of federal monies pursuant to the present statute," 397 U. S., at 421–422, indicates that the Court felt that retroactive relief was not a permissible remedy. Brief for Petitioner 17–20. We do not regard *Rosado* as controlling either way since the Court was not faced with a district court judgment ordering retroactive payments or with a challenge based on the Eleventh Amendment.

[19] Respondent urges that the State of Illinois has abolished its common-law sovereign immunity in its state courts, and appears to argue that suit in a federal court against the State may thus be maintained. Brief for Respondent 23. Petitioner contends that sovereign immunity has not been abolished in Illinois as to this type of case. Brief for Petitioner 31–36. Whether Illinois permits such a suit to be brought against the State in its own courts is not determinative of whether Illinois has relinquished its Eleventh Amendment immunity from suit in the federal courts. *Chandler* v. *Dix,* 194 U. S. 590, 591–592 (1904).

in *Ford Motor Co.* v. *Department of Treasury, supra,* that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court:

> "[The Attorney General of Indiana] appeared in the federal District Court and the Circuit Court of Appeals and defended the suit on the merits. The objection to petitioner's suit as a violation of the Eleventh Amendment was first made and argued by Indiana in this Court. This was in time, however. The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court." 323 U. S., at 466–467.

For the foregoing reasons we decide that the Court of Appeals was wrong in holding that the Eleventh Amendment did not constitute a bar to that portion of the District Court decree which ordered retroactive payment of benefits found to have been wrongfully withheld. The judgment of the Court of Appeals is therefore reversed and the cause remanded for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE DOUGLAS, dissenting.

Congress provided in 42 U. S. C. § 1983 that:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Con-

> stitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

In this class action respondent sought to enforce against state aid officials of Illinois provisions of the Social Security Act, 42 U. S. C. §§ 1381–1385, known as the Aid to the Aged, Blind, or Disabled (AABD) program.[1] The complaint alleges violations of the Equal Protection Clause of the Fourteenth Amendment and also violations of the Social Security Act. Hence § 1983 is satisfied *in haec verba*, for a deprivation of "rights" which are "secured by the Constitution and laws" is alleged. The Court of Appeals, though ruling that the alleged constitutional violations had not occurred, sustained federal jurisdiction because federal "rights" were violated. The main issue tendered us is whether that ruling of the Court of Appeals is consistent with the Eleventh Amendment.[2]

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[1] Effective January 1, 1974, this AABD program was replaced by a similar program. See 42 U. S. C. §§ 801–805 (1970 ed., Supp. II). The program in Illinois is administered by the Department of Public Aid. Ill. Rev. Stat., c. 23, §§ 3–1 to 3–12 (1973). The former program was funded in part by the State and in part by the Federal Government. 42 U. S. C. §§ 303, 304, 306, 1201–1204, 1206, 1351–1355, 1381–1385.

[2] The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

As the Court, speaking through MR. JUSTICE BRENNAN, said in *Parden* v. *Terminal R. Co.*, 377 U. S. 184, 186: "Although the Eleventh Amendment is not in terms applicable here, since petitioners are citizens of Alabama, this Court has recognized that an unconsenting State is immune from federal-court suits brought by its own citizens as well as by citizens of another State. *Hans* v. *Louisiana*, 134 U. S. 1; *Duhne* v. *New Jersey*, 251 U. S. 311; *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47, 51;

Once the federal court had jurisdiction over the case, the fact that it ruled adversely to the claimant on the constitutional claim did not deprive it of its pendent jurisdiction over the statutory claim. *United States* v. *Georgia Pub. Serv. Comm'n*, 371 U. S. 285, 287–288.

In *Ex parte Young*, 209 U. S. 123, a suit by stockholders of a railroad was brought in a federal court against state officials to enjoin the imposition of confiscatory rates on the railroad in violation of the Fourteenth Amendment. The Eleventh Amendment was interposed as a defense. The Court rejected the defense saying that state officials with authority to enforce state laws—"who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action." *Id.*, at 156. The Court went on to say that a state official seeking to enforce in the name of a State an unconstitutional act "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequence of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Id.*, at 159–160.

As the complaint in the instant case alleges violations by officials of Illinois of the Equal Protection Clause of the Fourteenth Amendment, it seems that the case is governed by *Ex parte Young* so far as injunctive relief is concerned. The main thrust of the argument is that the instant case asks for relief which if granted would affect the treasury of the State.

Most welfare decisions by federal courts have a fi-

Fitts v. *McGhee*, 172 U. S. 516, 524. See also *Monaco* v. *Mississippi*, 292 U. S. 313."

nancial impact on the States. Under the existing federal-state cooperative system, a state desiring to participate, submits a "state plan" to HEW for approval; once HEW approves the plan the State is locked into the cooperative scheme until it withdraws,[3] all as described in *King* v. *Smith*, 392 U. S. 309, 316 *et seq.* The welfare cases coming here have involved ultimately the financial responsibility of the State to beneficiaries claiming they were deprived of federal rights. *King* v. *Smith* required payment to children even though their mother was cohabitating with a man who could not pass muster as a

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[3] The Social Security Act states what a "state plan" must provide. At the time this suit was brought, 42 U. S. C. § 1382 (a) provided: "A State plan for aid to the aged, blind, or disabled, or for aid to the aged, blind, or disabled and medical assistance for the aged, must . . . .

. . . . . .

"(5) provide (A) such methods of administration . . . as are found by the Secretary to be necessary for the proper and efficient operation of the plan . . . ;

. . . . . .

"(8) provide that all individuals wishing to make application for aid or assistance under the plan shall have opportunity to do so, and that such aid or assistance shall be furnished with reasonable promptness to all eligible individuals;

. . . . . .

"(13) include reasonable standards, consistent with the objectives of this subchapter, for determining eligibility for and the extent of aid or assistance under the plan."

Nearly identical provisions are now found in 42 U. S. C. § 802 (a) (1970 ed., Supp. II).

The Secretary of HEW issued mandatory federal time standard regulations. Handbook, Public Assistance Administration, pt. IV, §§ 2200 (b)(3), 2300 (b)(5); 45 CFR § 206.10 (a)(3). Illinois adopted a 30-day standard for aged and blind applicants (Ill. Categ. Assistance Manual § 4004.1) as contrasted to HEW's 60-day period, § 2200, *supra*. It is that conflict which exposes the merits of the controversy.

"parent." *Rosado* v. *Wyman*, 397 U. S. 397, held that under this state-federal cooperative program a State could not reduce its standard of need in conflict with the federal standard. It is true that *Rosado* did not involve retroactive payments as are involved here. But the distinction is not relevant or material because the result in every welfare case coming here is to increase or reduce the financial responsibility of the participating State. In no case when the responsibility of the State is increased to meet the lawful demand of the beneficiary, is there any levy on state funds. Whether the decree is prospective only or requires payments for the weeks or months wrongfully skipped over by the state officials, the nature of the impact on the state treasury is precisely the same.

We have granted relief in other welfare cases which included retroactive assistance benefits or payments. In *State Dept. of Health and Rehabilitative Services* v. *Zarate*, 407 U. S. 918, the sole issue presented to us[4] was whether the Eleventh Amendment barred a judgment against state officers for retroactive welfare assistance benefits or payments. That had been ordered by the lower court and we summarily affirmed, only MR. JUSTICE WHITE voting to note probable jurisdiction. We also summarily affirmed the judgment in *Sterrett* v. *Mothers' & Children's Rights Organization*, 409 U. S. 809, where one of the two questions[5] was whether payments of benefits retroactively violated the Eleventh Amendment. In *Wyman* v. *Bowens*, 397 U. S. 49, we affirmed a judgment

[4] The lower court's opinion is found in 347 F. Supp. 1004.

[5] The jurisdictional statement had as its second question the following:

"Whether a federal court is precluded by the Eleventh Amendment to the United States Constitution from ordering a state agency to pay money from the state treasury and from further ordering the state agency to perform certain specified acts which would otherwise be in the discretion of the agency."

where payments were awarded in spite of the argument that the order was an incursion on the Eleventh Amendment.[6] In *Shapiro* v. *Thompson*, 394 U. S. 618, we affirmed a judgment which ordered payment of benefits wrongfully withheld;[7] and while we did not specifically refer to the point, the lower court had expressly rejected the Eleventh Amendment argument.[8]

As stated in *Gaither* v. *Sterrett*, 346 F. Supp. 1095, 1099, whose judgment we affirmed,[9] 409 U. S. 1070, the court said:

> "[T]his court would note that if defendants' position regarding the jurisdictional bar of the Eleventh Amendment is correct, a great number of federal district court judgments are void, and the Supreme Court has affirmed many of these void judgments."

The Court of Appeals for the Seventh Circuit is in line with that view; the opposed view of *Rothstein* v. *Wyman*, 467 F. 2d 226, from the Court of Appeals for the Second Circuit is out of harmony with the established law.

What is asked by the instant case is minor compared to the relief granted in *Griffin* v. *School Board*, 377 U. S. 218. In that case we authorized entry of an order putting an end to a segregated school system. We held, *inter alia*, "the District Court may, if necessary to prevent further racial discrimination, require the Supervisors to

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[6] The lower court's opinion is found in 304 F. Supp. 717. Retroactive payments were challenged in question 2 of the jurisdictional statement.

[7] The lower court's opinion is found in 270 F. Supp. 331.

[8] *Id.*, at 338 n. 5. The award of money damages was alleged to be a violation of the Eleventh Amendment in Part V of the jurisdictional statement.

[9] The jurisdictional statement in the *Sterrett* case explicitly urged that the decree below violated the Eleventh Amendment since it would expand itself in the public treasury—the second question in the jurisdictional statement.

exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia." *Id.*, at 233. We so held against vigorous contentions of the state officials that the Eleventh Amendment protected the State; and in reply we cited *Lincoln County* v. *Luning*, 133 U. S. 529, and *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U. S. 573, 579, to support the proposition that "actions against a county can be maintained in United States courts in order to vindicate federally guaranteed rights." 377 U. S., at 233.

Griffin is sought to be distinguished on the ground that a "county" is not the "state" for purposes of the Eleventh Amendment. But constitutionally the county in *Griffin* was exercising state policy as are the counties here, because otherwise the claim of denial of equal protection would be of no avail.

Counties are citizens of their State for purposes of diversity of citizenship. *Bullard* v. *City of Cisco*, 290 U. S. 179; *Moor* v. *County of Alameda*, 411 U. S. 693, 718–719. And they are not States for purposes of 28 U. S. C. § 1251 (a) which gives this Court original and exclusive jurisdiction of: "(1) All controversies between two or more states. . . ." *Illinois* v. *City of Milwaukee*, 406 U. S. 91, 98. But, being citizens of their State, suits against them by another State are in our original but not exclusive jurisdiction under 28 U. S. C. § 1251 (b)(3). *Ibid.* Yet, as agencies of the State whether in carrying out educational policies or otherwise, they are the State, as *Griffin* held, for purposes of the Fourteenth Amendment. And *Griffin*, like the present case, dealt only with liability to citizens for state policy and state action.

Yet petitioner asserts that money damages may not be awarded against state offenses, as such a judgment

will expend itself on the state treasury. But we are unable to say that Illinois on entering the federal-state welfare program waived its immunity to suit for injunctions but did not waive its immunity for compensatory awards which remedy its willful defaults of obligations undertaken when it joined the cooperative venture.[10]

It is said however, that the Eleventh Amendment is concerned not with immunity of States from suit, but with the jurisdiction of the federal courts to entertain the suit. The Eleventh Amendment does not speak of "jurisdiction"; it withholds the "judicial power" of federal courts "to any suit in law or equity . . . against one of the United States . . . ." If that "judicial power," or "jurisdiction" if one prefers that concept, may not be exercised even in "any suit in . . . equity" then *Ex parte Young* should be overruled. But there is none eager to take the step. Where a State has consented to join a federal-state cooperative project, it is realistic to conclude that the State has agreed to assume its obligations under that legislation. There is nothing in the Eleventh Amendment to suggest a difference between suits at law and suits in equity, for it treats the two without distinction. If common sense has any role to play in constitutional adjudication, once there is a waiver of immunity it must be true that it is complete so far as effective operation of the state-federal joint welfare program is concerned.

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[10] We settled in *Rosado* v. *Wyman*, 397 U. S. 397, the question whether the grant of authority under the Social Security Act to HEW to cut off federal funds for noncompliance with statutory requirements provides the exclusive procedure and remedy for violations of the Act. We said, "We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." *Id.*, at 420.

We have not always been unanimous in concluding when a State has waived its immunity. In *Parden* v. *Terminal R. Co.*, 377 U. S. 184, where Alabama was sued by some of its citizens for injuries suffered in the interstate operation of an Alabama railroad, the State defended on the grounds of the Eleventh Amendment. The Court held that Alabama was liable as a carrier under the Federal Employers' Liability Act, saying,

> "Our conclusion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act," *id.*, at 192.

The Court added:

> "Our conclusion that this suit may be maintained is in accord with the common sense of this Nation's federalism. A State's immunity from suit by an individual without its consent has been fully recognized by the Eleventh Amendment and by subsequent decisions of this Court. But when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation." *Id.*, at 196.

As the Court of Appeals in the instant case concluded, Illinois by entering into the joint federal-state welfare plan just as surely "[left] the sphere that is exclusively its own." *Ibid.*

It is argued that participation in the program of federal financial assistance is not sufficient to establish consent on the part of the State to be sued in federal courts. But it is not merely participation which supports a finding of Eleventh Amendment waiver, but

participation in light of the existing state of the law as exhibited in such decisions as *Shapiro* v. *Thompson*, 394 U. S. 618, which affirmed judgments ordering retroactive payments. Today's holding that the Eleventh Amendment forbids court-ordered retroactive payments, as the Court recognizes, necessitates an express overruling of several of our recent decisions. But it was against the background of those decisions that Illinois continued its participation in the federal program, and it can hardly be claimed that such participation was in ignorance of the possibility of court-ordered retroactive payments. The decision to participate against that background of precedent can only be viewed as a waiver of immunity from such judgments.

I would affirm the judgment of the Court of Appeals.

MR. JUSTICE BRENNAN, dissenting.

This suit is brought by Illinois citizens against Illinois officials. In that circumstance, Illinois may not invoke the Eleventh Amendment, since that Amendment bars only federal court suits against States by citizens of other States. Rather, the question is whether Illinois may avail itself of the nonconstitutional but ancient doctrine of sovereign immunity as a bar to respondent's claim for retroactive AABD payments. In my view Illinois may not assert sovereign immunity for the reason I expressed in dissent in *Employees* v. *Department of Public Health and Welfare*, 411 U. S. 279, 298 (1973): the States surrendered that immunity in Hamilton's words, "in the plan of the Convention," that formed the Union, at least insofar as the States granted Congress specifically enumerated powers. See *id.*, at 319 n. 7; *Parden* v. *Terminal R. Co.*, 377 U. S. 184 (1964). Congressional authority to enact the Social Security Act, of which AABD is a part, former 42 U. S. C. §§ 1381–1385

(now replaced by similar provisions in 42 U. S. C. § 801–804 (1970 ed., Supp. II)), is to be found in Art. I, § 8, cl. 1, one of the enumerated powers granted Congress by the States in the Constitution. I remain of the opinion that "because of its surrender, no immunity exists that can be the subject of a congressional declaration or a voluntary waiver," 411 U. S., at 300, and thus have no occasion to inquire whether or not Congress authorized an action for AABD retroactive benefits, or whether or not Illinois voluntarily waived the immunity by its continued participation in the program against the background of precedents which sustained judgments ordering retroactive payments.

I would affirm the judgment of the Court of Appeals.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BLACKMUN joins, dissenting.

The Social Security Act's categorical assistance programs, including the Aid to the Aged, Blind, or Disabled (AABD) program involved here, are fundamentally different from most federal legislation. Unlike the Fair Labor Standards Act involved in last Term's decision in *Employees* v. *Department of Public Health and Welfare*, 411 U. S. 279 (1973), or the Federal Employers' Liability Act at issue in *Parden* v. *Terminal R. Co.*, 377 U. S. 184 (1964), the Social Security Act does not impose federal standards and liability upon all who engage in certain regulated activities, including often-unwilling state agencies. Instead, the Act seeks to induce state participation in the federal welfare programs by offering federal matching funds in exchange for the State's voluntary assumption of the Act's requirements. I find this basic distinction crucial: It leads me to conclude that by participation in the programs, the States waive whatever immunity they might otherwise have from federal court

orders requiring retroactive payment of welfare benefits.[1]

In its contacts with the Social Security Act's assistance programs in recent years, the Court has frequently described the Act as a "scheme of cooperative federalism." See, *e. g.*, *King* v. *Smith*, 392 U. S. 309, 316 (1968); *Jefferson* v. *Hackney*, 406 U. S. 535, 542 (1972). While this phrase captures a number of the unique characteristics of these programs, for present purposes it serves to emphasize that the States' decision to participate in the programs is a voluntary one. In deciding to participate, however, the States necessarily give up their freedom to operate assistance programs for the needy as they see fit, and bind themselves to conform their programs to the requirements of the federal statute and regulations. As the Court explained in *King* v. *Smith*, *supra*, at 316–317 (citations omitted):

> "States are not required to participate in the program, but those which desire to take advantage of the substantial federal funds available for distribution to needy children [or needy aged, blind or disabled] are required to submit an AFDC [or AABD] plan for the approval of the Secretary of Health, Education, and Welfare (HEW). The plan must conform with several requirements of the Social Security Act and with rules and regulations promulgated by HEW."

So here, Illinois elected to participate in the AABD program, and received and expended substantial federal funds in the years at issue. It thereby obligated itself to comply with federal law, including the require-

[1] In view of my conclusion on this issue, I find it unnecessary to consider whether the Court correctly treats this suit as one against the State, rather than as a suit against a state officer permissible under the rationale of *Ex parte Young*, 209 U. S. 123 (1908).

ment of former 42 U. S. C. § 1382 (a)(8) that "such aid or assistance shall be furnished with reasonable promptness to all eligible individuals." In *Townsend* v. *Swank*, 404 U. S. 282, 286 (1971), we held that participating States must strictly comply with the requirement that aid be furnished "to all eligible individuals," and that the States have no power to impose additional eligibility requirements which exclude persons eligible for assistance under federal standards. Today's decision, *ante*, at 659–660, n. 8, properly emphasizes that participating States must also comply strictly with the "reasonable promptness" requirement and the more detailed regulations adding content to it.

In agreeing to comply with the requirements of the Social Security Act and HEW regulations, I believe that Illinois has also agreed to subject itself to suit in the federal courts to enforce these obligations. I recognize, of course, that the Social Security Act does not itself provide for a cause of action to enforce its obligations. As the Court points out, the only sanction expressly provided in the Act for a participating State's failure to comply with federal requirements is the cutoff of federal funding by the Secretary of HEW. Former 42 U. S. C. § 1384 (now 42 U. S. C. § 804 (1970 ed., Supp. II)).

But a cause of action is clearly provided by 42 U. S. C. § 1983, which in terms authorizes suits to redress deprivations of rights secured by the "laws" of the United States. And we have already rejected the argument that Congress intended the funding cutoff to be the sole remedy for noncompliance with federal requirements. In *Rosado* v. *Wyman*, 397 U. S. 397, 420–423 (1970), we held that suits in federal court under § 1983 were proper to enforce the provisions of the Social Security Act against participating States. Mr. Justice Harlan, writing for the Court, ex-

amined the legislative history and found "not the slightest indication" that Congress intended to prohibit suits in federal court to enforce compliance with federal standards. *Id.*, at 422.

I believe that Congress also intended the full panoply of traditional judicial remedies to be available to the federal courts in these § 1983 suits. There is surely no indication of any congressional intent to restrict the courts' equitable jurisdiction. Yet the Court has held that "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 398 (1946). "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." *Mitchell* v. *DeMario Jewelry*, 361 U. S. 288, 291–292 (1960).

In particular, I am firmly convinced that Congress intended the restitution of wrongfully withheld assistance payments to be a remedy available to the federal courts in these suits. Benefits under the categorical assistance programs "are a matter of statutory entitlement for persons qualified to receive them." *Goldberg* v. *Kelly*, 397 U. S. 254, 262 (1970). Retroactive payment of benefits secures for recipients this entitlement which was withheld in violation of federal law. Equally important, the courts' power to order retroactive payments is an essential remedy to insure future state compliance with federal requirements. See *Porter* v. *Warner Holding Co., supra*, at 400. No other remedy can effectively deter States from the strong temptation to cut

welfare budgets by circumventing the stringent requirements of federal law. The funding cutoff is a drastic sanction, one which HEW has proven unwilling or unable to employ to compel strict compliance with the Act and regulations. See *Rosado* v. *Wyman, supra,* at 426 (DOUGLAS, J., concurring). Moreover, the cutoff operates only prospectively; it in no way deters the States from even a flagrant violation of the Act's requirements for as long as HEW does not discover the violation and threaten to take such action.

Absent any remedy which may act with retroactive effect, state welfare officials have everything to gain and nothing to lose by failing to comply with the congressional mandate that assistance be paid with reasonable promptness to all eligible individuals. This is not idle speculation without basis in practical experience. In this very case, for example, Illinois officials have knowingly violated since 1968 a federal regulation on the strength of an argument as to its invalidity which even the majority deems unworthy of discussion. *Ante,* at 659–660, n. 8. Without a retroactive-payment remedy, we are indeed faced with "the spectre of a state, perhaps calculatingly, defying federal law and thereby depriving welfare recipients of the financial assistance Congress thought it was giving them." *Jordan* v. *Weaver,* 472 F. 2d 985, 995 (CA7 1972). Like the Court of Appeals, I cannot believe that Congress could possibly have intended any such result.

Such indicia of congressional intent as can be gleaned from the statute confirm that Congress intended to authorize retroactive payment of assistance benefits unlawfully withheld. Availability of such payments is implicit in the "fair hearing" requirement, former 42 U. S. C. § 1382 (a)(4), which permitted welfare recipients to challenge the denial of assistance. The regulations

which *require* States to make corrective payments retroactively in the event of a successful fair hearing challenge, 45 CFR § 205.10 (a)(18), merely confirm the obvious statutory intent. HEW regulations also authorize federal matching funds for retroactive assistance payments made pursuant to court order, 45 CFR §§ 205.10 (b)(2), (b)(3). We should not lightly disregard this explicit recognition by the agency charged with administration of the statute that such a remedy was authorized by Congress. See *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 433–434 (1971).

Illinois chose to participate in the AABD program with its eyes wide open. Drawn by the lure of federal funds, it voluntarily obligated itself to comply with the Social Security Act and HEW regulations, with full knowledge that Congress had authorized assistance recipients to go into federal court to enforce these obligations and to recover benefits wrongfully denied. Any doubts on this score must surely have been removed by our decisions in *Rosado* v. *Wyman, supra,* and *Shapiro* v. *Thompson,* 394 U. S. 618 (1969), where we affirmed a district court retroactive payment order. I cannot avoid the conclusion that, by virtue of its knowing and voluntary decision to nevertheless participate in the program, the State necessarily consented to subject itself to these suits. I have no quarrel with the Court's view that waiver of constitutional rights should not lightly be inferred. But I simply cannot believe that the State could have entered into this essentially contractual agreement with the Federal Government without recognizing that it was subjecting itself to the full scope of the § 1983 remedy provided by Congress to enforce the terms of the agreement.

Of course, § 1983 suits are nominally brought against state officers, rather than the State itself, and do not

ordinarily raise Eleventh Amendment problems in view of this Court's decision in *Ex parte Young*, 209 U. S. 123 (1908). But to the extent that the relief authorized by Congress in an action under § 1983 may be open to Eleventh Amendment objections,[2] these objections are waived when the State agrees to comply with federal requirements enforceable in such an action. I do not find persuasive the Court's reliance in this case on the fact that "congressional authorization to sue a class of defendants which literally includes States" is absent. *Ante*, at 672. While true, this fact is irrelevant here, for this is simply not a case "literally" against the State. While the Court successfully knocks down the strawman it has thus set up, it never comes to grips with the undeniable fact that Congress has "literally" authorized this suit within the terms of § 1983. Since there is every reason to believe that Congress intended the full panoply of judicial remedies to be available in § 1983 equitable actions to enforce the Social Security Act, I think the conclusion is inescapable that Congress authorized and the State consented to § 1983 actions in which the relief might otherwise be questioned on Eleventh Amendment grounds.

My conclusion that the State has waived its Eleventh Amendment objections to court-ordered retroactive assistance payments is fully consistent with last Term's

[2] It should be noted that there has been no determination in this case that state action is unconstitutional under the Fourteenth Amendment. Thus, the Court necessarily does not decide whether the States' Eleventh Amendment sovereign immunity may have been limited by the later enactment of the Fourteenth Amendment to the extent that such a limitation is necessary to effectuate the purposes of that Amendment, an argument advanced by an *amicus* in this case. In view of my conclusion that any sovereign immunity which may exist has been waived, I also need not reach this issue.

decision in *Employees* v. *Department of Public Health and Welfare,* 411 U. S. 279 (1973). As I emphasized in my concurring opinion, there was no voluntary action by the State in *Employees* which could reasonably be construed as evidencing its consent to suit in a federal forum.

> "[T]he State was fully engaged in the operation of the affected hospitals and schools at the time of the 1966 amendments. To suggest that the State had the choice of either ceasing operation of these vital public services or 'consenting' to federal suit suffices, I believe, to demonstrate that the State had no true choice at all and thereby that the State did not voluntarily consent to the exercise of federal jurisdiction . . . ." *Id.,* at 296.

A finding of waiver here is also consistent with the reasoning of the majority in *Employees,* which relied on a distinction between "governmental" and "proprietary" functions of state government. *Id.,* at 284–285. This distinction apparently recognizes that if sovereign immunity is to be at all meaningful, the Court must be reluctant to hold a State to have waived its immunity simply by acting in its sovereign capacity—*i. e.,* by merely performing its "governmental" functions. On the other hand, in launching a profitmaking enterprise, "a State leaves the sphere that is exclusively its own," *Parden* v. *Terminal R. Co.,* 377 U. S., at 196, and a voluntary waiver of sovereign immunity can more easily be found. While conducting an assistance program for the needy is surely a "governmental" function, the State here has done far more than operate its own program in its sovereign capacity. It has voluntarily subordinated its sovereignty in this matter to that of the Federal Government, and agreed to comply with the conditions imposed

by Congress upon the expenditure of federal funds. In entering this federal-state cooperative program, the State again "leaves the sphere that is exclusively its own," and similarly may more readily be found to have voluntarily waived its immunity.

Indeed, this is the lesson to be drawn from this Court's decision in *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275 (1959), where the Court found that the States had waived the sovereign immunity of the Commission by joining in an interstate compact subject to the approval of Congress. The Court in *Petty* emphasized that it was "called on to interpret not unilateral state action but the terms of a consensual agreement" between the States and Congress, *id.*, at 279, and held that the States who join such a consensual agreement, "by accepting it and acting under it assume the conditions that Congress under the Constitution attached." *Id.*, at 281–282. Although the congressional intent regarding the sue-and-be-sued clause was by no means certain, the Court held that the surrounding conditions made it clear that the States accepting it waived their sovereign immunity, *id.*, at 280, especially since this interpretation was necessary to keep the compact "a living interstate agreement which performs high functions in our federalism." *Id.*, at 279.

I find the approach in *Petty* controlling here. As even the dissent in that case recognized, *id.*, at 285 (Frankfurter, J., dissenting), Congress undoubtedly has the power to insist upon a waiver of sovereign immunity as a condition of its consent to such a federal-state agreement. Since I am satisfied that Congress has in fact done so here, at least to the extent that the federal courts may do "complete rather than truncated justice," *Porter* v. *Warner Holding Co.*, 328 U. S., at 398, in § 1983 actions authorized by Congress against state welfare authorities, I respectfully dissent.